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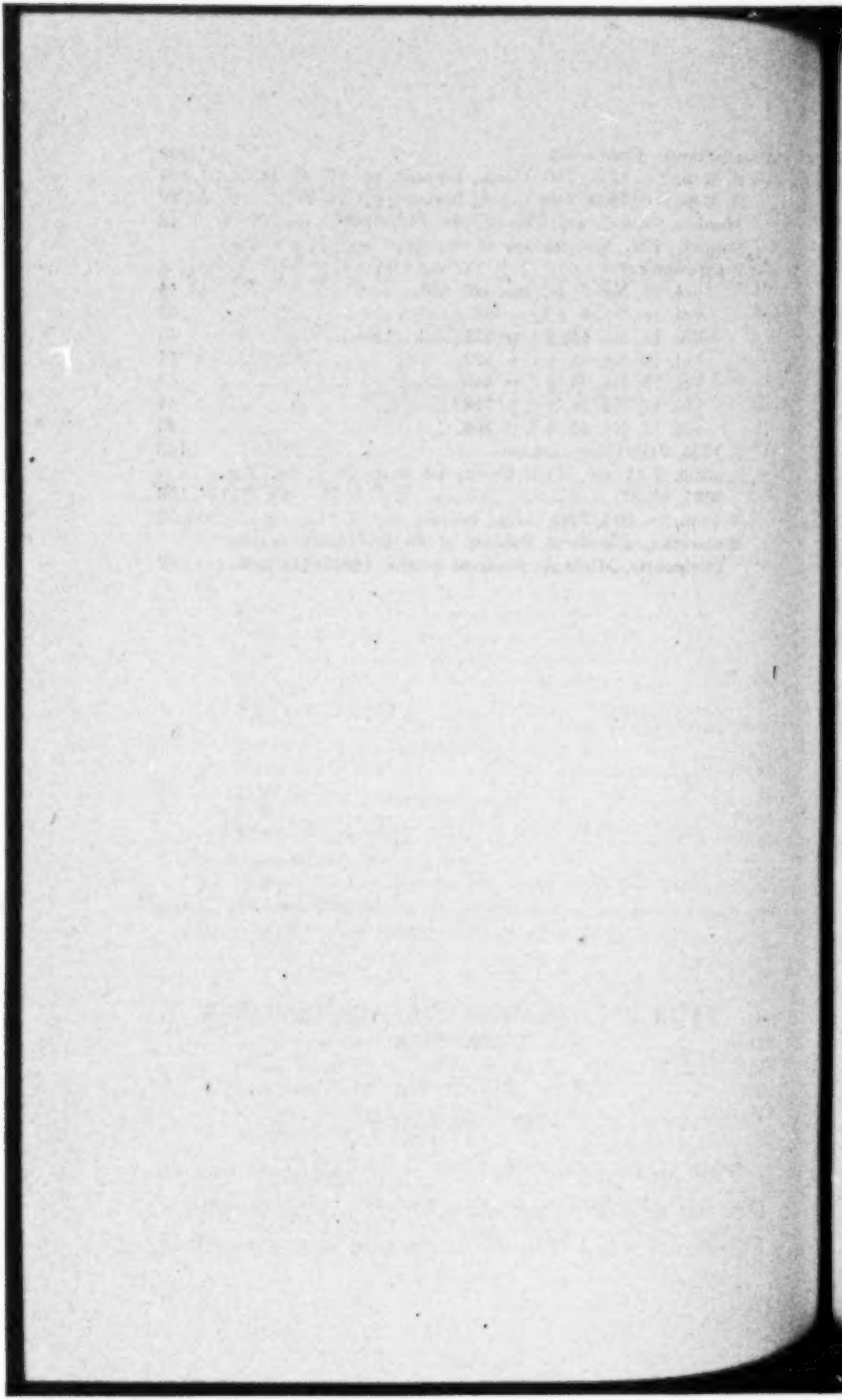
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 2

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

ENGINEERS PUBLIC SERVICE COMPANY, ET AL.

No. 3

ENGINEERS PUBLIC SERVICE COMPANY, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia (R. 1208–35) are reported in 138 F. 2d 936. The findings and opinions of the

Commission (R. 78–165) are thus far reported only in the Commission's Holding Company Act Releases Nos. 3796 and 3835.

JURISDICTION

The judgment of the Court of Appeals (R. 1236) was entered November 22, 1943. The petitions for writs of certiorari were granted June 5, 1944. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79 x (a), hereinafter referred to as the "Act").

QUESTIONS PRESENTED

1. Is Section 11 (b) of the Public Utility Holding Company Act (15 U. S. C. § 79 k (b)) constitutional under the Commerce Clause and under the Due Process Clause? And did the Commission properly refuse to admit certain purported "evidence" which was offered by Engineers to controvert the Congressional findings and to establish that the provisions of Section 11 (b) (1) are without rational support?

2. Did the Commission properly order Engineers, under Clause (B) of Section 11 (b) (1), to divest itself of the electric and gas utility systems of certain of its subsidiaries on the ground that Clause (B) requires all integrated public-utility systems which are retained by a holding

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company to be located in the same region with its "single integrated public-utility system"?

3. Did the Commission properly order Engineers, under Clause (A) of Section 11 (b) (1), to divest itself of the gas utility system of one of its subsidiaries on the ground that Engineers had not proved that "substantial economies" would be lost by divestment?

4. Since the specific non-utility properties which the Commission ordered divested have been voluntarily disposed of after the decision of the court below, is the question of the construction of the "other business" clauses of Section 11 (b) (1) moot?

5. In the event that the existence of other non-utility properties in the system prevents the issue from being moot, was the Commission's construction of the "other business" clauses of Section 11 (b) (1) correct?

6. Did the Commission properly undertake the designation of the single integrated public-utility system permitted to be retained by Engineers under Section 11 (b) (1), in default of any alternative designation by Engineers itself despite repeated invitations to do so?

7. Assuming the Commission correctly ordered divestment of certain properties and erred with respect to separate portions of the order requiring divestment of other properties, should not the reviewing court have affirmed in part and reversed in part instead of reversing the entire order?

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (Act of Aug. 26, 1935, c. 687, Title I, 49 Stat. 803, 15 U. S. C. § 79 *et seq.*). The relevant provisions of Sections 1, 2, 3, 4, and 11 of the statute are set forth in Appendix A, *infra*, pp. 133 et seq.

In general the Act provides for the regulation of electric and gas utility holding-company systems. Its major provisions are of three types:

1. Public-utility holding companies (unless exempt because of their intrastate scope or otherwise) are prohibited from engaging in interstate commerce or using the mails unless registered with the Commission.

2. Registered holding companies are subject to substantive regulations with respect to such matters as the issuance of securities, the sale and acquisition of assets, the payment of dividends, and the like.

3. Registered holding companies are subject also to the corporate simplification and integration provisions of Section 11.

It is the last-mentioned provisions, particularly the integration provisions of Section 11 (b) (1), which are before the Court in this case.

STATEMENT

A. REFERENCE TO MATTERS COVERED IN THE GOVERNMENT'S BRIEF IN THE NORTH AMERICAN CASE

In April 1943 the Commission filed its brief in *The North American Company* v. *S. E. C.*, now

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No. 1, present Term, which, like the *Engineers* case, presents the question of the constitutionality of Section 11 (b) of the Act. To avoid needless repetition, we are relying on that brief for a statement of the background of the statute and for our argument that Section 11 (b) as applied to the typical interstate holding company system subject to the registration requirements of the Act is within the commerce power and that the provisions of Section 11 (b) (1) as applied to such a holding company system do not violate the Fifth Amendment. Discussion of constitutional issues in this brief will be limited to a specification of the facts which make applicable to Engineers the argument set forth in the *North American* brief, and to a contention of Engineers not presented in the *North American* case or in the *American* and *Electric cases*, Nos. 6 and 7, that the Commission erred in refusing to receive certain purported "evidence" offered by Engineers on the constitutional issues. In view of the lapse of time since the *North American* brief was filed, we make reference herein to pertinent recent decisions which are applicable to the argument presented in that brief.

Some of the questions as to the interpretation of Section 11 (b) (1) presented in this case were also presented and ruled on favorably to the Commission's contentions by the Second Circuit in The North American case, but these issues have not been presented by North American's petition.

B. THE ENGINEERS SYSTEM

Engineers registered as a public-utility holding company pursuant to Section 5 of the Act (15 U. S. C. § 79e) on February 21, 1938. It was incorporated in Delaware in 1925 and has its principal offices in New York City. None of its subsidiaries operates in Delaware or New York. Engineers controls various corporations which are engaged in both utility and non-utility businesses in widely scattered sections of the country.[1] When integration proceedings were instituted under Section 11 (b) (1), the companies in the Engineers system furnished electric service in fifteen states scattered from Virginia to Washington and from Florida to South Dakota, and furnished gas service in three of those states. They also engaged in various non-utility businesses (bus and street railway systems, interurban and suburban transportation lines, toll bridges, ice and cold storage plants, electric and gas appliance jobbing and merchandising, and various water, steam and telephone enterprises) in fourteen states as well as Canada and Mexico. The direct subsidiaries of Engineers were eight in number:

1. Virginia Electric and Power Company (hereinafter referred to as "Virginia") operated elec-

[1] Section 2 (a) (5) of the Act (15 U. S. C. § 79b (a) (5)) defines a public-utility company to mean only an electric or gas utility operating company. Accordingly, transportation systems, toll bridges, water plants, etc., will be referred to as non-utilities in this brief.

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tric utility and appliance businesses in Virginia and North Carolina, and gas utility and appliance, street railway, bus and ice businesses in Virginia.

2. Gulf States Utilities Company (hereinafter referred to as "Gulf") operated electric utility, electric appliance and water businesses in Louisiana and southeastern Texas, gas utility, gas appliance and steam businesses in Louisiana, and an ice business in Texas.

3. El Paso Electric Company, a Delaware corporation which had itself registered as a holding company, controlled through stock ownership two other companies (a Texas company of the same name and El Paso and Juarez Traction Company) operating electric utility and appliance businesses and street railway, bus and toll bridge properties in western Texas, New Mexico, and Mexico.

4. Savannah Electric and Power Company operated electric utility and appliance businesses and a street railway system in Georgia.

5. Baton Rouge Bus Company, Inc., owned a bus line in Louisiana, which was operated under the auspices of Gulf.

6. The Key West Electric Company operated an electric utility business in Florida.

7. Puget Sound Power & Light Company, together with its subsidiaries, operated electric and gas utility, telephone, ice, cold storage and steam businesses in Oregon, Washington and British Columbia.

8. The Western Public Service Company, together with its subsidiaries, operated electric utility, ice, water and steam heating businesses in Colorado, Iowa, Kansas, Missouri, Nebraska, South Dakota and Wyoming.

In addition to these eight subsidiaries, Engineers owned an 8.5% stock interest in El Paso Natural Gas Company, which was not a "subsidiary" as defined in Section 2 (a) (8) of the Act (15 U. S. C. § 79b (a) (8)). Finally, the entire holding-company system used and bore the cost of service furnished by Engineers Public Service Company, Inc., a mutual service company which maintained its executive offices in New York, the state of its incorporation, and was owned by the several subsidiaries of Engineers.[1]

Maps indicating the location of all the utility properties in the system are attached as Appendixes B, C and D, *infra*. It will be seen from Appendix D that the distances separating the executive offices of Engineers in New York City from the areas served by its electric and gas subsidiaries ranged from 375 to 3100 miles.

It is apparent from this description that the Engineers system operated in a widely spread territory. As of the date proceedings were insti-

[1] All the above facts with reference to the Engineers system appear at R. 51–53 and T. 9537–38. The initial "R." refers to the printed record and the initial "T." to the unprinted portions of the transcript of testimony, which has been filed in this Court.

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tuted under Section 11 (b) (1), the customers for its electric service alone numbered 440,000, and the areas served had populations amounting to more than 2,500,000 (T. 9563). It had 21,300 stockholders (T. 9560), and as of December 31, 1940, its assets on a consolidated basis came to nearly $375,000,000 (T. 9551–53).

The relation of Engineers to its subsidiaries has not been confined to a holding of their securities. It has exercised active control over them. By virtue of its voting power, which has ranged from 65% to 100% in the several subsidiaries (T. 9559), it has elected their boards of directors, designated their executive officers and transferred them from one subsidiary to another (R. 455, 566–67, 609, 632, 690, 710). Through the medium of the service company, all of whose principal officers occupy identical positions in Engineers (T. 3971, 9535, 9770), the latter has arranged for the financing of its subsidiaries (R. 1199), negotiated for their bank loans and the sales of their securities (R. 1199), reviewed the contents of reports prepared by them for regulatory bodies and tax authorities (R. 1151–53, 1201, 1203), prepared and distributed reports to stockholders and information about the system for general publication (R. 1199), and generally supervised the subsidiaries' financial, operating and construction matters (R. 1143, 1199–1205, T. 9565). In a very real sense Engineers has dominated the entire system.

C. THE COMMISSION'S PROCEEDINGS AND THE ORDERS UNDER REVIEW

The Commission instituted proceedings under Section 11 (b) (1) by order and notice on February 28, 1940. Engineers filed an answer on April 5, 1940 and on May 23, 1940 it moved to dismiss the proceeding on the ground that no preliminary report of studies by the Commission under Section 11 (a) or Section 30 of the Act had been rendered to it with respect to its holding-company system. In that connection Engineers contended, among other things, that the order and notice were improper because, failing to specify in what respects the holding-company system did not comply with the standards of Section 11 (b) (1), they did not tender specific issues for hearing and therefore cast an undue burden upon Engineers. The Commission considered the motion to dismiss as in effect a request for a statement of its views as to what action was necessary to bring about compliance by Engineers with Section 11 (b) (1).[8] It postponed the hearing and directed the preparation of a study of the Engineers' system to aid it in arriving at its tentative conclusions as to the necessary action. The results of the study were subsequently reported to the Commission, which issued a statement of

[8] *Engineers Public Service Company*, 7 S. E. C. 371 (1940).

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its tentative conclusions on March 11, 1941, and ordered hearings to be held.

On July 23, 1941, after hearings in accordance with the order, the Commission issued an opinion and order requiring Engineers to divest itself of all its interest in The Key West Electric Company and Puget Sound Power & Light Company. The Commission found (and it was not disputed by Engineers) that the "single integrated public-utility system" which Engineers would ultimately be permitted to retain would obviously be Virginia or Gulf, the first and second respectively in terms of 1940 net income (T. 9562), and that in either case the continued control by Engineers of the properties of Key West and Puget Sound would contravene the geographical standard of Clause (B) of Section 11 (b) (1). For reasons stated in its opinion, the Commission did not at that time enter a similar order of divestment with respect to The Western Public Service Company, but the Commission made the same finding with respect to the status of that company under Clause (B) and an order of divestment was subsequently entered by consent. *Engineers Public Service Co.*, Holding Company Act Releases Nos. 3230 and 3245. No review was sought of the Commission's order of July 23, 1941, and it is not now before this Court.

After further hearings which followed that order, the Commission issued another opinion and

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order on September 16, 1942 (R. 78–162), in which it required the divestment by Engineers of all of its remaining properties other than the electric system of Virginia, constituting its "single integrated public-utility system," together with that company's electric appliance and ice businesses.[4] In the exercise of its discretion, however, the Commission, as it had announced it would do in its opinion of July 23, 1941 (R. 278), made advisory findings as to those properties which would be retainable by Engineers if it elected Gulf rather than Virginia as its "single integrated public-utility system," and permitted Engineers to petition for leave, within fifteen days, to retain Gulf's electric utility system instead of Virginia's (R. 129–50, 154).[5] This is the first of the Commission

[4] Divestment of the Gulf and El Paso utility properties was ordered by virtue of Clause (B) of Section 11 (b) (1); divestment of Virginia's gas utility systems was ordered by virtue of Clause (A); divestment of the electric utility system of Savannah Electric & Power Company was ordered by virtue of Clauses (A) and (C); and divestment of the transportation properties and the remaining non-utility businesses of Virginia, Gulf, El Paso, Baton Rouge Bus Company and Savannah Electric & Power Company, as well as Engineers' interest in the mutual service company and its 8.5% stock interest in El Paso Natural Gas Company, was ordered by virtue of the "other business" clauses.

[5] The Commission found in this portion of its opinion that Engineers, if it elected Gulf, would be permitted to retain the major portion of Gulf's electric utility system, Gulf's electric appliance business, and Gulf's steam business, but would have to divest itself of all the remaining non-utility properties in the Engineers system by reason

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orders (R. 159–62) which was under review below.[6]

The second order (R. 163–65), entered October 6, 1942, denied a petition for a rehearing and for a stay, except that another fifteen-day period was granted Engineers in which to petition for leave to retain the electric utility system of Gulf instead of that of Virginia. No such petition for the retention of Gulf was filed, and the Commission's order based on Virginia as the "single integrated public-utility system" became final.[7]

D. THE OPINIONS BELOW

On petition for review filed in the United States Court of Appeals for the District of Columbia, the

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of the "other business" clauses, of Gulf's gas utility system by reason of Clause (A), of the El Paso utility properties by reason of Clauses (A) and (C), and of the Virginia and Savannah utility properties by reason of Clause (B).

[6] In addition, since El Paso Electric Company of Delaware was itself a registered holding company subject to integration under Section 11 (b) (1), the same order required that company (entirely apart from the integration of Engineers) to limit its operations to the electric utility system and the appliance business of its subsidiary, El Paso of Texas, and to divest itself, under the "other business" clauses, of the transportation and toll bridge businesses of both its subsidiaries (R. 138–39, 160–61).

[7] Since the Commission entered no order with respect to the properties which Engineers could retain if Gulf rather than Virginia were selected as its "single integrated public-utility system," we believe the Commission's advisory findings in that respect are not subject to judicial review. See pages 17 n. 9, 91–93, *infra*.

Commission's orders were set aside and the case was remanded to the Commission for further proceedings in accordance with the court's opinion (R. 1208–36). The court held as follows with respect to each of the seven questions (*supra*, pp. 2–3) now before this Court:

1. As to constitutionality, the court followed a previous case which it had decided, as well as decisions by the Second and Third Circuit Courts of Appeals, upholding both Section 11 (b) (1) and Section 11 (b) (2) (R. 1232).[8] The court held further that the Commission had properly excluded the statistical "evidence" proferred by Engineers in an attempt to contravene the Congressional findings in Section 1 of the Act (15 U. S. C. § 79a) and to demonstrate that Section 11 (b) (1) violates the Fifth Amendment. The court agreed with the Commission that an administrative body has no authority to weigh "evidence" of that character or to pass on the constitutionality of a statute which it is called upon to administer (R. 1232–34).

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[8] *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148 (C. C. A. 2) (Section 11 (b) (1)), certiorari granted, No. 1, present Term; *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 747 (C. C. A. 3) (Section 11 (b) (2)); *Central & South West Utilities Co.* v. *Securities and Exchange Commission*, 136 F. 2d 273 (App. D. C.) (Section 11 (b) (2)); *United Gas Improvement Co.* v. *Securities and Exchange Commission*, 138 F. 2d 1010 (C. C. A. 3) (Section 11 (b) (1)).

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2. The court held that (assuming the retention by Engineers of the electric utility system of Virginia) the Commission had properly ordered Engineers to divest itself of the electric and gas utility systems of Gulf and the electric system of El Paso, located in Texas, Louisiana and New Mexico, on the ground that Clause (B) of Section 11 (b) (1) permits the retention of additional integrated public-utility systems only if all such systems are located in the same region as the "single integrated public-utility system," in this case the electric utility system of Virginia (R. 1213–16). The court thus adopted the "one-area" interpretation of Clause (B) advocated by the Commission, and not Engineers' "two-area" interpretation under which Clause (B) would permit the retention of additional systems in states distant from the single system.

3. The court held (Judge Soper dissenting on this one point) that the Commission had properly found that Engineers could not retain the gas system of Virginia as a utility system additional to the Virginia electric system, on the ground that Engineers had not established that divestment of the gas system would result in the loss of "substantial economies" within the meaning of Clause (A) of Section 11 (b) (1) (R. 1217–21).

4–5. The court held that the Commission had erred in ordering Engineers, under the "other business" clauses of Section 11 (b) (1), to divest

itself of its interest in the transportation properties owned and operated by Virginia (R. 1222–29). It was not disputed that, if the Commission's construction of the statutory standards was correct, the transportation businesses could not be retained. The court, however, rejected the Commission's construction, under which the retention of a non-utility business is not permitted unless that business is related to the operations of a retainable utility system in such a manner as to aid those utility operations. The Congressional intention, the court stated, was to forbid the divestment of other businesses which met certain standards, "irrespective of the functional relationship between these businesses and the principal system"* (R. 1225).

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*On the basis of Virginia's electric utility system as the "single integrated public-utility system" of Engineers, the status of the remaining properties ordered to be divested by Engineers under the "other business" clauses is as follows:

(1) There was no contest below as to (a) its interest in the transportation and electric appliance businesses of Savannah Electric and Power Company, (b) its 8.5% stock participation in El Paso Natural Gas Company, and (c) its interest in Engineers Public Service Company, Inc., the mutual service company.

(2) The court made no specific reference to the retainability by Engineers of (d) the gas appliance business of Virginia, (e) the electric and gas appliance, steam, water and ice businesses of Gulf, and (f) the electric appliance business of El Paso. This silence may reflect a feeling that, since these businesses are more or less closely related to electric or gas utility businesses which were properly ordered to be divested, they too must be taken out of the

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6. With respect to the selection of the "single integrated public-utility system" of Engineers, the court's opinion is not clear. Although the Commission, without deciding whether the statute so required, gave Engineers the privilege of making the initial choice and published advisory findings in order to enable it to exercise that privilege, the court held (R. 1229–32) that the choice lay with the company as a matter of right and seemingly indicated at least partial approval of the company's contention that it was entitled to exercise that right at any time within a year (§ 11 (c), 15 U. S. C. § 79k (c)).

7. Although the remaining portions of the Commission's orders were not contested [10] and most of

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Engineers system under any construction of the "other business" clauses so long as the electric utility system of Virginia is the only utility system retainable by Engineers.

Engineers did contest the Commission's advisory finding that it would have to divest itself of Gulf's water business if it selected the Gulf electric system rather than the Virginia electric system as its "single integrated public-utility system." But, as we have stated (note 7, supra), these advisory findings of the Commission were never made the basis of any order and are not subject to review. The court below apparently agreed with this view, although it did note that its construction of the "other business" clauses would be equally applicable with respect to Gulf's water business (Engineers did not contest the advisory finding as to the divestment of Gulf's ice business) "if the court should pass on the findings of the Commission in [that] regard" (R. 1229).

[10] In addition to the properties specified in note 9, *supra*, there was no contest as to the divestment, under Clauses (A) and (C), of the electric utility system of Savannah Electric & Power Company (R. 1216–17).

the questions presented were decided favorably to the Commission, the court set aside both orders and remanded the case to the Commission for further proceedings on the ground that the "final order should be complete in itself and cover all phases of the case" (R. 1236).

B. DEVELOPMENTS SINCE THE COMMISSION'S ORDERS

Engineers has taken many steps in harmony with the Commission's orders. Since some of these steps may have the effect of rendering some of the issues moot or may cast some light on the proper disposition of the remaining issues (see questions 4, 5, 6, and 7), the facts of those developments are set forth at this point.

At present the only remaining properties of Engineers consist of—

(1) the electric properties of Virginia Electric and Power as augmented by recent acquisitions and the attendant retainable appliance and ice businesses;

(2) the gas business of Virginia;

(3) the electric utility and appliance business of Gulf States;

(4) the gas business of Gulf;

(5) the water and ice properties of Gulf;

(6) the electric utility and appliance businesses of El Paso of Texas; and

(7) a small portion of the properties of Western Public Service.

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This situation is the result of the following developments:

(1) In the area of Virginia Electric and Power Company, the electric area served has been substantially increased by a merger of Virginia Electric and Power Company with the previously unaffiliated Virginia Public Service Company (see Holding Company Act Release No. 5021, May 1, 1944). The relative and combined size of the two companies are shown by the following chart:

	Electric plant and property [1]	Area served (square miles)	Number of customers served
Virginia Electric & Power	$66,065,867	13,500	198,264
Virginia Public Service	43,173,407	16,000	138,973
Combined total	110,287,974	29,500	335,258

[1] As at November 30, 1943. Does not give effect to electric plant adjustments (account No. 107), electric plant acquisition adjustments (account No. 100.5), utility plant adjustments (account No. 108.17) and utility plant acquisition adjustments (account No. 108.18.)

The street railway and bus business of Virginia Electric and Power Company was disposed of in December 1944. These are the properties ordered divested by the Commission's order under review and as to which the court below reversed the order. In addition Virginia Electric and Power had acquired additional transportation properties in connection with its merger with Virginia Public Service. These additional properties were disposed of in March 1945.

Virginia thus at present has only its electric utility business and electric utility appliance business, its ice business, all of which the Commission

held retainable, and the Virginia gas business held by the Commission and the court below not to be retainable.

(2) With respect to the properties of Gulf States Utilities Company, small parts of the water and ice business have been disposed of, but as of April 30, 1945, the Gulf States Utilities Company still retained an ice plant and a water plant carried at cost in the amounts of $365,994 and $1,872,970, respectively.

(3) In respect of the El Paso properties, the traction and toll bridge properties have been disposed of. On December 31, 1943, El Paso Electric Company of Texas sold its transportation properties and El Paso Electric Company of Delaware sold its stock in El Paso and Juarez Traction Company. In December 1944 El Paso of Delaware was liquidated (Holding Company Act Release No. 5499, December 13, 1944), so that at present Engineers has in the El Paso area only one subsidiary—El Paso Electric Company of Texas—which is solely engaged in the electric utility and appliance businesses.

(4) Savannah Electric and Power Company was disposed of in April 1945, and Engineers retains no interest in any part of the business of that company (see Holding Company Act Release No. 5738, April 19, 1945).

(5) Baton Rouge Bus Company, Inc., was disposed of on July 2, 1943.

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(6) In August 1943, Engineers disposed of all interest in the Key West Electric Company.

(7) Puget Sound Electric Power and Light Company was reorganized under Section 11 (e) of the Holding Company Act under a plan which left Engineers with approximately 3% of the stock of that company (see Holding Company Act Release No. 4255, April 28, 1943). Subsequently, in 1944 Engineers disposed of all of its interests in Puget Sound Power and Light by selling the stock which it then held.

(8) Various properties of the Western Public Service Company have been disposed of piecemeal since 1942. At present there remains only a small part of that property located in Wyoming, having total assets of $1,758,022 as at December 31, 1944.

(9) A remaining holding of Engineers in the stock of El Paso Natural Gas Company was disposed of during March 1944.

(10) Engineers' interest in Missouri Service Company and the Northern Kansas Power Company was sold during June 1945.

(11) On September 10, 1945, Engineers filed with the Commission a plan for the disposition of its interests in Gulf and El Paso. The plan provides for the sale of the stock of Gulf to the present common stockholders of Engineers and the pro rata distribution to the common stockholders of Engineers of the stock of El Paso. The preferred stock

of Engineers would be paid off in part by the proceeds of the sale of the Gulf common and in part from other sources. In its letter to stockholders the company states that it is not expected that the plan would be consummated until after the decision of the instant case. The plan contains the following reservation of rights:

> In filing this Plan, Engineers does so solely under compulsion and upon the basis that such Plan constitutes a means whereby Engineers may comply with the orders of the Commission entered on September 16, 1942, and October 6, 1942, and otherwise comply with the Act. This Plan is filed without waiver and with full reservation of all constitutional and legal rights of Engineers and its subsidiaries to attack the validity and legality of any section or any subdivision of any section of, or any order, rule or regulation under, the Act, including, without limitation, the right to proceed with argument of their case involving Section 11 of the Act pending in the Supreme Court of the United States at any time hereafter when a quorum of such court may be available to participate in the decision of such case, and it is respectfully requested that the Commission's order or orders herein shall reserve to Engineers and its subsidiaries the rights hereinabove referred to.

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SUMMARY OF ARGUMENT

I

Section 11 (b) (1) of the Public Utility Holding Company Act is a valid exercise of the commerce power. As is more fully shown in the Government's brief in the *North American* case, No. 1, the Act is effectively designed to apply to typical public utility holding companies whose operations are characteristically scattered over many states and whose significant activities are interstate in character. The Engineers' system is not shown to be in any way atypical. On the contrary, through subsidiaries, Engineers engages in the interstate transmission of energy; Engineers utilizes the channels and instrumentalities of interstate commerce to exercise active control over its system; and the system has engaged in widespread flotations of securities. Thus Engineers, either directly or as the head of the system, has engaged in all the forms of activity enumerated as bases of federal regulation in *Electric Bond & Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419.

The due process clause does not prohibit the choice of means which Congress has adopted to correct the evils found to inhere in the public utility holding company device. Machinery is provided for fair and equitable plans of reorganization whereby system securities may be distrib-

uted among the security holders of the holding company. Divestment of holdings to achieve greater integration of properties and simplification is an appropriate means, short of elimination of the holding company device, to ameliorate the abuses which have been found and to reduce the problem of continuing regulatory control to more manageable proportions.

The so-called constitutional evidence proffered by Engineers was properly excluded by the Commission for the reason that the Commission does not have authority to pass on the constitutional validity of the statute which it administers. Moreover, the evidence proffered, if considered by a reviewing court, could not have affected the conclusion that Section 11 is constitutional. The statistical data proffered, if designed to describe conditions antedating the Act, merely constituted an attempt to project into the courts a challenge to the conclusions reached by Congress in the light of the exceptionally comprehensive investigation and debate which preceded the enactment of the statute. If designed to describe conditions during the enforcement of the regulatory provisions of the Act, the study could not negative the congressional findings concerning the necessity of federal control; and insofar as it touches on the choice of means adopted, it cannot controvert the judgment of Congress which was compounded of many subsidiary judgments leading to the conclusion that the task of effective control of public utility hold-

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ing company systems should not be entrusted solely to the continuing supervision of a federal administrative agency, but should be made more manageable and in part restored to the states by geographic limitations and simplification of corporate structures. Legislative judgments of this kind cannot be tested, much less nullified, by judicial review resting on limited statistical calculations or the opinion of a solitary investigator.

II

The court below was right in sustaining the provision of the Commission's order which held that the Gulf and El Paso utility systems are not retainable under Clause (B) of Section 11 (b) (1) as additional systems with the Virginia electric system. The statutory clause imposes, as one of three cumulative tests for the retention of a system additional to the principal retained system, that "all of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country." The Commission's view is that an additional system may be retained only if it is located in the same geographic area as the single system. The view of Engineers is that additional systems themselves located in one state, or in any states adjoining any one state, are retainable, no matter how remote the states in which such additional systems are located may be from the principal system.

The construction taken by the Commission provides a more natural point of reference for the statutory phrases "adjoining states" and "a contiguous foreign country." It is supported by the legislative history, in particular by the Conference Report and the explanation made by Senator Wheeler, in charge of the bill in the Senate. It is far better adapted to carrying out the dominant purpose of the legislation than is the construction of Engineers. It is much more consonant with the coordinate tests for the retention of additional systems in Section 11 (b) (1), particularly the requirement of Clause (C) that "the continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation." The anomalies resulting from Engineers' construction are illustrated by the fact that if the Gulf and El Paso systems are retainable as additional systems with the Virginia electric system, the Virginia gas system, which Engineers also seeks to retain, is not also retainable, since it is not located in the same or adjoining states with the Gulf and El Paso systems, though it is located in the same state with the principal system.

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III

The court below was right in sustaining the provision of the Commission's order which ruled that the Virginia gas utility system is not retainable under Clause (A) as an additional system with the Virginia electric system. Clause (A) requires, as a condition of retention of additional utility systems, that the Commission find that "each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system." On the evidence presented, the Commission was unable to make a finding that the Virginia gas system could not be operated as an independent system without the loss of substantial economies, as provided by the statute. It is clear from the statute and its legislative history that, under Clause (A), a company well able to stand alone was to be given its independence from the principal retained system. The evidence before the Commission tended to show a potential slight increase in expenses of independent operation of both the gas and the electric systems. The Commission concluded that not only were the estimated increases in expense relatively too slight to warrant retention, but that there would be important countervailing financial advantages upon divestment. Divestment would be likely to redound to the advantage of the gas

system, freed from the same control as the larger and more remunerative electric system. Moreover, certain increased expenditures of the gas system could be expected to produce greater income. At the very least, the record falls far short of requiring the Commission to make the prediction that substantial economies would be lost by divestment.

IV

The holding of the court below that the Commission erred in its construction and application of the so-called "other business" clauses of Section 11 (b) (1) appears now to have become moot. The Commission's order, posited on the Virginia electric system as the principal system, required the divestment of traction and toll bridge properties of Virginia and El Paso. After the decision of the court below, these properties were disposed of. In our view, the controversy concerning the "other business" clauses has accordingly become moot.

The Commission in its order included also what we regard as advisory opinions to the effect that if Gulf, instead of Virginia, were to be the principal retained system, it would be necessary under the other-business clauses that Gulf dispose of certain water and ice properties. If these advisory findings are reviewable, the issue is not moot, since the latter properties have not been

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disposed of. Similarly, the issue would not be moot if Engineers is entitled to an order in the alternative describing the properties which may be retained according as Engineers may choose Virginia or Gulf as its principal system.

V

If the controversy concerning the "other business" clauses is not moot, it is submitted that the court below erred in disapproving the Commission's order in that regard. In passing upon the retention of non-utility businesses, the Commission is directed by the statute to limit the operations of a holding company system to a single integrated public utility system "and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operation of such integrated public utility system." It is also provided that the Commission "may permit" as reasonably incidental, or economically necessary or appropriate, the retention of an interest in a nonutility business which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems. The Commission has taken the position that a nonutility business is retainable under these clauses only when that business is related to the operations of a retainable utility system in such a way

as to aid the utility operations. Thus the Commission has permitted retention of the electric appliance and ice businesses of Virginia, since the appliance business is operated to encourage the use of electricity and the ice business to heat and cool the electric utilities building.

The Commission's construction, stressing the relationship between retained properties, harmonizes with the pervasive objectives of the statute and with the standards applicable to the retention of additional utility systems. The construction advanced by Engineers and adopted by the court below would relegate the Commission to a standard of "public interest" whose vagueness was the subject of trenchant criticism leveled against the House-approved bill which had contained that sole standard as a guide for the retention of non-utility businesses. If the Commission is right in stressing the requirement that a non-utility business, to be retained, must be related to the operations of a retained public utility system, it is not disputed that the facts justified the Commission's order.

If the court below was right in taking a broader view of the "other business" clauses, the court should, it is submitted, have given greater heed to the statutory phrase "may permit" in the second other-business clause. This language suggests that, if a relatively relaxed standard is to govern the application of the other-

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business clauses, the Commission is at all events permitted broad latitude in giving content to the concept of public interest in this connection. The Commission in fact indicated that retention of the other businesses in question would not be consonant with the public interest. The decision below thus, however viewed, constitutes an unwarranted remand to the Commission or a substitution of the judgment of the court for that of the Commission in weighing the considerations appropriate to the standard of public interest as applied to the retention of non-utility properties.

VI

The court below held that Engineers was entitled as of right to make the initial choice of its principal retained system. This question was not properly the subject of decision, since before designating Virginia the Commission had in fact given Engineers an opportunity to make a choice and had indeed issued advisory findings concerning the additional properties which could be retained in the event that Virginia or, alternatively, Gulf were designated by Engineers as the principal system. It is not clear whether the court below approved the contention of Engineers that it is entitled to make its choice at any time during the one-year period prescribed by Section 11 (c) for compliance with an order of the Commission. A simliar contention was prop-

erly rejected by the Second Circuit in the *North American* case, in the light of the provisions of Section 11 (b) requiring the Commission "as soon as practicable" to order such action as "it shall find necessary" to limit the operations of each holding-company system as prescribed by Section 11 (b) (1). The one-year period was not meant to forestall an order but to follow it.

There is no contention that in fact Engineers wished to designate Gulf as its principal system. By all the relevant standards, including the representations and conduct of Engineers itself, Virginia was plainly the obvious choice. This fact, together with the privilege actually tendered to Engineers of making its choice, and the provision for modification of the order if warranted by subsequent developments, impels the conclusion that wholly unwarranted delay would result from further extension of time for the claimed privilege of designating the principal system.

VII

The court below should have affirmed those parts of the Commission's order which were not held by it to be erroneous, and this Court should affirm all valid portions of the order which have not become moot. The holding of the court below with respect to the relatively insignificant transportation properties, under the other-business clauses, did not warrant a remand of the entire order, as the court appears to have believed. A remand

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of the entire order because of error with respect to a relatively minor provision would start a new one-year period for compliance under Section 11 (c). In this Court, it is suggested that if the issue as to the transportation properties has become moot, as we think, the decree of the court below should be vacated in pertinent part and the petition for review in that court ordered dismissed to that extent, and the remaining portions of the Commission's order if held to be valid should be affirmed.

ARGUMENT

I. Section 11 (b) of the Act Is Constitutional

A. COMMERCE POWER

In the brief for the Commission in No. 1, *North American Co.* v. *Securities and Exchange Commission*, we pointed out that registered holding company systems are interstate enterprises whose significant activities are carried on in interstate commerce and substantially affect such commerce; that those activities adversely affect interstate commerce to the detriment of investors and consumers; and that Congress has power under the commerce clause to regulate such holding companies by elimination or appropriate limitation as provided in Section 11 (b) of the Act. We analyzed the structure of the statute and showed that it was so designed that registration was required only of companies which were engaged in interstate commerce or substantially affected interstate commerce.

Engineers in its brief below and North American in its briefs in this Court have analyzed the structure of the Act and have attempted to conjure up the possibility that the provisions of the Act might require registration by some company, technically a holding company, which might, as they contend, be so remotely related to interstate commerce as not to support regulation. They have pointed out that no administrative or judicial finding in respect of relation to interstate commerce is required in the application of Section 11 of the Act, and have argued that no legislative finding is made of the relation to interstate commerce of holding companies required to register, an argument which, if valid, would seem to apply to each of the regulatory provisions of the Act applicable, as is Section 11, to all registered holding companies.

We have indicated in the *North American* brief that the Act is designed to cover the typical interstate public-utility holding company system, whose operations are characteristically scattered over many states and whose significant activities are interstate in character. We have analyzed the definition, registration, and exemptive provisions of the statute and we believe that they have adequately provided that companies not of the type designed to be covered by the Act and primarily local in character may be exempted.[11] And our

[11] In connection with the exemptions for intrastate companies, the North American Company made some point

experience under those provisions has failed to reveal a single case where any difficulty was experienced on this score. But in any event, even if it be assumed that under some circumstances some company might be subjected to registration and to Section 11 whose connection with interstate commerce was too remote to support constitutional power, the only result would be to render the Act invalid as applied to that particular company.

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of the Commission's power to deny exemption to companies predominately intrastate in character, where the Commission finds exemption detrimental to the public interest or the interest of investors or consumers. It was argued that under this section exemption could be denied to an intrastate company for reasons having no relation to the regulation of interstate commerce. We pointed to the contrary indications of the Act itself and the language of cases granting exemptions. At the time the brief in the North American Company was filed, no cases had arisen under which the Commission had occasion to deny any exemption under its reserved power under Section 3 (a) (1). However, since that time two such cases have arisen. *Buffalo, Niagara and Eastern Power Corp.*, — S. E. C. — (1944), Holding Company Act Release No. 5115, and *Long Island Lighting Co.*, — S. E. C. — (1945), Holding Company Act Release No. 5746. In the *Buffalo, Niagara* case the Commission denied in part an application for exemption from all the provisions in the Act insofar as the requested exemption related to Section 11 (b) (2). In the *Long Island Lighting Company* case, the Commission revoked in part an exemption granted in 1936. In both cases the opinion of the Commission clearly shows that it regarded the interest of investors and consumers referred to in Section 3 (a) as the same interest mentioned in Section 1 of the Act, an interest closely related to regulation of interstate commerce.

For Congress clearly indicated its purpose in Section 32 of the Act that "If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

And whatever the remote possibility that such a company may exist, no such case is before the Court. Engineers has not undertaken to show that its own activities are so localized in character that the statute is unconstitutional as applied to it. So far from being shown to be atypical, it is clear that Engineers, as its activities are revealed in the present record, is precisely the type of nationwide interstate holding company the regulation of which Congress contemplated when it passed the Act.

Engineers is incorporated in Delaware (R. 51). Its system, at the date integration proceedings were instituted under Section 11 (b) (1), contained 19 companies (R. 53). It had eight direct subsidiaries, of which one, El Paso of Delaware, was itself a registered holding company (R. 53). It controlled all of these companies from its central offices in New York, and many of the most important activities of the companies in the system were supervised by Engineers Public Service Company, Inc., the mutual service company (R.

1143, 1199–1205).[12] The operations of the system were conducted in 15 states covering the length and breadth of the country, as well as Canada and Mexico, and no part of those operations (except the supervisory activities of Engineers and the mutual service company in New York) was conducted either in Delaware, where Engineers is incorporated, or in New York, its principal place of business (R. 53). Moreover, the principal subsidiaries of Engineers have clearly been engaged in interstate commerce; for the interconnected electric utility systems of each of four of its direct subsidiaries, as well as an indirect subsidiary, covered two or more states (R. 53).[13]

In the face of these facts Engineers argues that it is a mere owner of stock in other corporations and that stock ownership is a purely local activity. Even if this were so, it is clear that activities which are *per se* intrastate may be regulated under the commerce clause when they affect interstate

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[12] The comprehensive services performed by the mutual service company are enumerated by Engineers itself at R. 1199–1205.

[13] These four direct subsidiaries are Virginia, Gulf, Puget Sound Power & Light Company and The Western Public Service Company, and the indirect subsidiary is El Paso of Texas. Each of the electric utility systems of Virginia, Gulf and El Paso of Texas (with minor exceptions in the case of the last two) was found by the Commission to constitute a single "integrated public-utility system" within the meaning of Section 2 (a) (29) (15 U. S. C. § 79b (a) (29)) (R. 256, 140).

commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61; *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 747 (C. C. A. 3). We have already demonstrated, however, that Engineers is not a mere investor in its subsidiaries, but has exercised active control over them and, either itself or through the mutual service company, has managed and dominated every substantial activity of the companies in the system (page 9, *supra*). The petition for review filed below almost speaks for itself on this score; for it is signed on behalf of every one of the nine petitioning companies by Donald C. Barnes as president of Engineers and of the mutual service company and as vice president of the others (R. 74–75).[14]

Moreover, the control exerted by Engineers over the entire system is effectuated by the use of the mails and facilities of interstate commerce, as when proxies are sent, for example, from Delaware to Texas (T. 2488–90), instructions or "ad-

[14] Mr. Barnes was questioned and testified as follows (R. 1146):

"Q. In other words, if I state your mind correctly, it is that all the executives of the companies in the Engineers system have, from the inception, operated under supervision from New York, so that none of them would be qualified to operate the companies on their own?

"A. That is correct."

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vice" given, reports received, and the like. By way of illustration, it will not be disputed, as the registration records of the Commission show, that between the date of registration and February 28, 1940, the date integration proceedings were instituted, the system sold to the public almost $75,000,000 of securities and that these were largely interstate flotations.[15]

Thus, Engineers, either directly or through its subsidiaries, has engaged in all the types of activities mentioned as a basis for federal regulation in *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. That case, although limited to the constitutionality of the registration provisions of Sections 3 and 4 of the Act, established two propositions: (1) that a corporation is brought within the reach of Congress under the commerce clause when it engages in the transmission of electric energy or gas across state lines, or renders services to subsidiary companies through instrumentalities of interstate commerce, or sells securities in interstate commerce; and (2) that, whether such activities are

[15] Since the latter date the system has sold to the public another $150,000,000 par or principal amount of securities. Engineers itself, moreover, has its common and preferred stocks listed on the New York and Boston Stock Exchanges and its common stock is admitted to unlisted trading privileges on the Philadelphia Stock Exchange. The stocks are actively traded. Most of the securities issued by the companies in the system and not owned by other system companies are similarly traded on national securities exchanges.

carried out by a holding company directly or by subsidiary operating companies, the holding company is still within the reach of Congress under the commerce power, since "the constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise" (303 U. S. at 440).

The *Bond & Share* decision thus recognizes that control of utility subsidiaries is the essential characteristic of a holding company, and establishes that the activities of a holding company and its subsidiaries are to be regarded for constitutional purposes as what in fact they are—the activities of a single enterprise. Moreover, even if analysis is limited to the activities of the holding company itself, upon which the Commission's order directly impinges, the interstate transactions of Engineers which we have outlined involve the essence of its business; and, since they are commercial transactions which constitute commerce within the meaning of the commerce clause [18] and are carried out and performed by the use of the facilities of interstate commerce and "concern more states than one," they constitute interstate commerce. See *The Minnesota Rate Cases*, 230 U. S. 352, 398; *Second Employers' Liability Cases*, 223 U. S. 1, 46; *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 195; *In-*

[18] *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, and cases cited.

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ternational Textbook Co. v. *Pigg*, 217 U. S. 91, 107." Plainly, therefore, Congress was not acting outside its proper sphere in dealing with Engineers.

Indeed, the activities of Engineers and its service company in New York are so clearly within the commerce power that similar activities have been held to fall within the Fair Labor Standards Act, a statute which, as this Court held, does not extend to the full reach of Congressional power under the Commerce Clause. *Cf. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522, 523. Thus, in *Borden Co.* v. *Borella*, No. 688, last Term, decided June 11, 1945, Mr. Justice Murphy, dealing with the functions carried on in the office building of the Borden Company and holding them subject to the Fair Labor Standards Act, used language almost exactly descriptive of the activities carried on in New York by Engineers and its service company:

> Petitioner has manufacturing plants and factories in both the United States and Canada and its products are sold in large volumes throughout this and other countries. These establishments are admittedly engaged in the production of goods for interstate commerce. The heart of this indus-

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[11] The fact that many of these instances of communication and transportation do not occur between a vendor and vendee is not material for purposes of Congressional power under the commerce clause. *The Pipe Line Cases*, 234 U. S. 548, 560; *United States* v. *Hill*, 248 U. S. 420, 423, 424.

trial empire, however, lies in the central office building in New York City. Here the entire enterprise is supervised, managed and controlled.

In this building the directors meet and the corporate officers conceive and direct the policies of the company. Although geographically divorced from the manufacturing plants, employees working in this building dictate, control and coordinate every step of the manufacturing processes in the individual factories. By means of direct teletype wires, they maintain detailed and meticulous supervision of the plants, the local superintendents exercising discretion only in the conduct of routine matters. While no products are actually processed or sold in the building, the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the legal matters, the labor policies and the maintenance of the plants and equipment are all directed from this building. * * *

B. DUE PROCESS

In our brief in the *North American* case we pointed out that Congress having found an evil to exist and having determined that divestment of properties was a proper method of correcting that evil, the due process clause does not prohibit

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the carrying out of the Congressional judgment merely because compliance may involve expense. Furthermore, we pointed out that market values indicate that compliance with the Act may in fact result in substantial benefits to investors in securities of the holding company. The facts with reference to the *Engineers* case are the same as was indicated with reference to the North American Company and the change in the market situation since the North American brief was filed has not at all altered the judgment of the market as to the benefits to investors of divestment in accordance with Section 11.[18] It was pointed out

[18] That it would be pure speculation to assume that security holders will suffer depreciation in the value of their investments upon compliance with the divestment order is evidenced by the fact that independent statistical services reach a contrary conclusion. According to *The Outlook* (publication of Standard and Poor's Corporation, Vol. 17, No. 26, § 1, p. 709), the estimated liquidating value of the common stock of Engineers was $32 as of June 25, 1945, as compared with a market price of $27. A similar analysis as of March 26, 1945 (*Id.*, Vol. 17, No. 13, § 1, p. 848), showed a liquidating value of $23 for Engineers common as compared with a then market value of $18¼. As of March 29, 1943 (*Id.*, Vol. 15, No. 13, § 1, p. 822), the liquidating value of the common stock was estimated at $6, as compared with a market price of $4¾; as of February 9, 1942 (*Id.*, Vol. 13, No. 6, § 1, p. 936), the common's liquidating value was shown at $6 as compared with its then market value of $2¾; and as of February 17, 1941 (*Id.*, Vol. 11, No. 7, § 1, p. 920), the liquidating value was calculated at $15 per share with the market price at $5½. Another financial journal (*Moody's Stock Survey*, Vol. 33, No. 13, p. 746) estimated the liquidating value of the com-

that the Act does not require the "dumping" of securities on the market for sale for cash but that machinery is provided for fair and equitable plans for distribution of securities among the security holders of the holding company. Such a plan was before this Court in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, and indeed Engineers itself has secured approval under Section 11 (e) of the Act of plans designed to comply with those provisions of the Commission's order requiring it to dispose of its interest in Puget

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mon stock at $8½ as of March 31, 1941, when the market was $4¾; and *Barrons* (Vol. XXIII, No. 40, p. 15) calculated the liquidation value of Engineers' common at $16.75 as of October 4, 1943, as compared with a market price of $9. These same publications show a similar relationship between the estimated liquidating values and the market values of the three classes of Engineers' preferred stock. *The Outlook* for February 17, 1941 (Vol. 11, No. 7, § 1, p. 921), stated: "Common stocks benefitting from liquidation of holding-company systems would be Engineers Public Service, * * *." The same issue stated also: "Particularly benefitted by such a move would be the preferred stocks of * * * Engineers Public Service * * *."

These figures—representative of those relating to holding companies generally, as the articles in *The Outlook* reveal—indicate that securities of holding companies in general, and of Engineers in particular, have sold in recent years at substantial discounts from their break-up values. On August 28, 1944, *The Outlook* (Vol. 16, No. 34, § 1, p. 572) stated: "Numbered among the most active stocks in recent weeks, Engineers Public Service has further distinguished itself by rising to the highest price since 1937. It has not, however, exhausted its speculative possibilities. At 14, it is at a wide discount from esti-

Sound Power and Light Company and its minority stock participation in El Paso Natural Gas Company."

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mated liquidating value (22) and has considerable speculative appeal." With respect to the pending case of *North American Company* v. *Securities and Exchange Commission*, No. 1, present Term, *Barrons* (Vol. XXIII, No. 14, p. 18, April 5, 1943) stated: "Regardless of the decision which that Court reaches, there seems to be little reason for apprehension by North American Company stockholders." And, with respect to the present case before this Court, as well as with respect to the *North American* case, *The Outlook* (Vol. 17, No. 25, § 1, p. 718, June 18, 1945) recently stated:

"Regardless of the outcome, there will be little change in the long-term outlook for the utility industry. The decision will merely determine the proportions between holding company securities and those of operating companies which will be in the hands of the investor after the SEC has completed its work.

"The element of uncertainty has been one of the reasons why many utility holding company securities have continued to sell at substantial discounts from their indicated liquidating or exchange values. We remain of the opinion that the more strongly situated stocks of utility holding companies, where these issues continue to sell at wide discounts, still possess considerable attraction for appreciation."

"The plan with respect to the former company calls for a recapitalization of Puget Sound whereby Engineers received, in exchange for the 99% of Puget Sound's common stock which it formerly owned, only 3% of a new common stock issue, and Engineers has already sold this stock. This plan was approved by the Commission (*Puget Sound Power & Light Co.*, Holding Company Act Release No. 4255) and enforced by the United States District Court for the District of Massachusetts (*In re Puget Sound Power & Light Co.*, Civil Action No. 2308, June 10, 1943).

The appropriateness of the remedy of divestment to carry out the Congressional judgment and the propriety of the procedure prescribed by the statute under the due process clause are discussed in the *North American* brief (pp. 96–101).

C. THE PROFFERED "CONSTITUTIONAL EVIDENCE" WAS PROPERLY EXCLUDED BY THE COMMISSION AND IN NO EVENT COULD SUFFICE TO OVERTURN THE JUDGMENT OF CONGRESS

Engineers proffered before the Commission certain "evidence" consisting of statistics and other data compiled by Professor Merwin H. Waterman of the University of Michigan in the course of a study which Engineers had financed (R. 906). The study was undertaken in 1940–1941, and dealt with data chiefly in the year 1939 (R. 905, 923), when the regulatory provisions of the statute had been enforced by the Commission for several years. The "evidence" purported to show that the evils recited in Section 1 (b) do not in fact

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The plan approved by the Commission with respect to El Paso Natural Gas Company called for the issuance of the common stock of that company owned by Engineers to the preferred stockholders of Engineers in exchange for their preferred stock (*Engineers Public Service Co.*, Holding Company Act Release No. 4550), although subsequent market developments rendered the exchange unattractive and no exchanges were actually made. See also the Commission's findings and opinion with respect to the disposition by Engineers of the greater part of its interest in The Western Public Service Company (*Western Public Service Co.*, Holding Company Act Releases Nos. 3230 and 3245).

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exist and that the Congressional findings insofar as they relate to Section 11 (b) (1) are arbitrary and capricious. The Commission excluded this material on the ground that it had no jurisdiction to entertain questions of constitutionality (R. 248–51, 289). The Commission, however, permitted a formal proffer of the "evidence" to be made (R. 251–52, 289), and the material in question was printed by Engineers as Volume III of the record (R. 893–1140). Engineers has urged that this "evidence" be considered on remand to the Commission. The court below held that the material was properly excluded by the Commission, and added, in a vague statement, that this holding is "without prejudice to the right of the petitioner to raise the same question hereafter in such other manner as it may be advised." (R. 1234.) We submit not only that the material was inadmissible before the Commission but that its consideration by the court below or by any other court could not possibly affect the constitutionality of Section 11.

An administrative agency is not empowered, we believe, to receive for its consideration evidence proffered to show that its governing statute is invalid. So the court below ruled (R. 1234), and its ruling is in harmony with that of other courts. *Panitz* v. *District of Columbia*, 112 F. 2d 39, 42 (App. D. C.); *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475, 478 (C. C. A. 6).

Furthermore, a court would not be warranted in weighing evidence of the sort here proffered against the materials which underlay the judgment of the legislature. This is not a case where evidence is offered to show that as applied to the particular circumstances of the complainant a statute would be invalid, or where the facts supporting the legislation are not disclosed. Cf. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194. This is not a case where evidence is offered to show that circumstances unforeseen or unprovided for by the legislature have rendered a statute presently invalid. Cf. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543. Nor is this a case where evidence is offered to show that the injury to interstate commerce caused by a State statute is disproportionate to the ends served by the statute, in a field where a state legislature is perforce not the authoritative arbiter of conflicting local and national interests. Cf. *Southern Pacific Co.* v. *Arizona*, No. 58, last Term, decided June 18, 1945. This is a case where evidence is offered, in the form of conclusions from statistical data, to show that no need exists for the full scope of the remedial legislation adopted by Congress to deal with an unusually complex set of problems, after an extraordinarily comprehensive series of investigations and exceptionally extensive debate, in which the industry affected fully availed itself of the opportunity to present its case. Judged even by the standards ap-

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plicable to motions for a new trial in purely judicial proceedings, the proffered evidence would not warrant re-examination of an original judgment. There is immeasurably greater reason to decline thus to open up a legislative judgment to a judicial trial. This Court said, in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154:

> Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. * * *

Cf. *Carolene Products Co.* v. *United States*, 323 U. S. 18, 29.

If Acts of Congress which rest on declared findings and on abundant legislative investigation were to be placed before trial courts to determine the sufficiency of the evidence to support the findings, upon a record enlarged for purposes of the trial, the validity and enforcement of Federal laws would be at the hazard of successive attacks addressed to separate triers of fact by separate parties on separate records. The old saw of the philosophical skeptics—Truth on one side of the Pyrenees, Falsehood on the other—would have

its application in American constitutional law. Courts have understandably recognized the impropriety of such a course. The words of Judge Hamilton in *R. C. Tway Coal Co.* v. *Glenn*, 12 F. Supp. 570, 582 (W. D. Ky.),[20] are apt:

> The Congress has already investigated the facts as a basis for its action. If its findings may be impeached by the testimony of opinion witnesses, the act might be found to be constitutional in one case and unconstitutional in another, depending on the testimony. As many conclusions might be reached as to constitutionality as there might be judges, or upon such facts as ingenuity might suggest as matters of opinion or actual facts in evidence.[21]

What has been said applies with special force to the Holding Company Act, which reflects governmental, economic and social judgments reached by men experienced in regulatory endeavor and acting in the light of intensive expert investigations

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[20] Reversed on other grounds, *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

[21] Cf. also *Olsen* v. *Nebraska ex rel. Western Reference & Bond Ass'n, Inc.*, 313 U. S. 236, 246; *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 747, 753 (C. C. A. 3), where the court stated, in sustaining the constitutionality of Section 11 (b) (2):

"* * * Congress concluded that unduly complicated corporate structures of holding companies affected interstate commerce adversely. Congress having thus incorporated its conclusion in the act itself it is not for this court to make an independent study of the economic data upon which the legislative conclusion was based."

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and resulting recommendations. The proffered study could do no more than leave the subject where it found it—in the realm of debate.

This conclusion is all the more evident when the proffered study is examined more closely and its limitations perceived. Cf. *Carolene Products Co. v. United States,* 323 U. S. 18. The study undertook to investigate the relationship between the objectives of the Act and the provisions of Section 11; more particularly, the relationship between the protection of investors and consumers and the factors of holding-company control, size of operating companies, size of holding-company systems, and distance of operating companies from system headquarters, and, finally, the "relationship between the factors of holding company control and the effectiveness of public regulation of operating utilities." (R. 907.) This investigation, which involved elaborate statistical analyses, comparisons and correlations, was carried on through the use of "Hollerith machine tabulating equipment." (R. 920–921.) Some obvious deficiencies in the study, even within its own frame of reference, may be noted briefly before passing to its more fundamental inadequacy.[22] In dealing with the

[22] We make no special point of the statistical infirmities throughout the study. Two examples will suffice. (1) Comparison as to efficiency is made between independent companies and holding-company subsidiaries (R. 959–974) without reference to the most essential factor, the size of the companies (R. 967, 968). The balance is weighted against the independents because 50% of these companies

relative protection of investors in holding-company system and independent companies, the study does not treat the subject of securities of holding companies themselves, but merely compares bonds and preferred stocks of independent utilities with those of operating subsidiaries of holding companies. (R. 1026, 1027.) In dealing with the effect of geographical separation of properties, the study does not consider the desirability of integration and coordination of operating properties to their most efficient scale, and the way in which this is promoted and facilitated by the Act (R. 1100 *et seq.*); the omission is the more notable in view of the author's assertions in 1932 regarding the uselessness of geographical scattering of utility prop-

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had annual gross revenues of less than $250,000 a year, while only 25% of holding-company subsidiaries were that small (R. 1044, 1045). (2) The study indicates that "independents" serve communities on the average more than twice as large as holding-company subsidiaries (R. 925). This average fails to indicate that six large companies [Consolidated Edison Company of New York, Inc., Commonwealth Edison Company (serving Chicago), Boston Edison Co., Public Service Electric and Gas Co. (serving most of the population of New Jersey), Pacific Gas and Electric Co., and Consolidated Gas Electric and Power Co. (of Baltimore)] account for a preponderant part of all the population served by all the 182 "independents", and that some of those companies were in fact holding company subsidiaries. *Cf.* R. 926, Ex. III-2 with *Public Service Company of New Jersey* v. *S. E. C.*, 129 F. 2d 899 (C. C. A. 3d, 1942), certiorari denied, 317 U. S. 691, and *Pacific Gas and Electric Co.* v. *S. E. C.*, 10 S. E. C. 39, — U. S. —, No. 55, 1944 Term.

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erties."[2] In comparing independent utilities and subsidiaries of holding companies, the study does not compare the same holding-company subsidiaries before and after regulation under the Act. (R. 923.)

This suggests the fundamental and pervasive deficiency in the study—that it is limited to a period (1939–1940) during which the regulatory provisions of the Act were being enforced by the Commission. There are intimations that the commendable showing of holding-company subsidiaries disclosed by the study may be attributable to Federal regulation (R. 1128–29, 1131, 1133, 1135). Gratitude for the implied tribute to the Commission must not, however, be permitted to inflate our judgment of the significance of the study. An investigation confined to a short period of operation of the Act could by its very nature demonstrate nothing concerning the evils of holding-company practices, the need for the legislation or the appropriateness of means to end. At best it could be addressed to the question whether the provisions of section 11 were necessary in view of the operation of the other provisions of the Act. But this question is one that Congress specifically anticipated, fully debated, and resolved in the light of factors reaching far beyond the statistical

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[2] See Waterman, *Financial Policies of Public Utility Holding Companies*, Michigan Business Studies (1932) pp. 2–3.

results of a short period of administration. Section 11 reflected a judgment that the task of coping with the deep-seated and inherent evils of the public-utility holding company device should not be committed indefinitely to the vigilance of a federal administrative agency but should be reduced to more manageable form, not indeed through the elimination of the device but through a limit on corporate complexities, and that in part the task should be restored to the care of the states, through the divestiture of local utilities from the bonds of far-flung corporate empires.

The desirability and practical necessity of these measures of structural reform, as compared with an attempt at purely regulatory control, involves administrative and social judgments that are no more subject to disproof by statistical calculations than, for example, is the familiar controversy between exponents of competition and advocates of regulated monopoly. We do indeed live in an age of mechanical marvels; but no Hollerith machine has yet been devised which will furnish to legislators or judges infallible answers to these recurring problems of judgment in government. The author of the study is compelled to acknowledge as much; "in my opinion," he states, it is "not possible to measure statistically and objectively so intangible a thing as effectiveness of public regulation of utilities." (R. 1124.) Faced with the ulti-

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mate question of choice of means, as Congress itself was, the author, referring to the effects of Section 11 (b) (1), ventures this statement in the closing paragraph of the study (R. 1136): "In my opinion the operating subsidiaries which are thus removed from the regulatory jurisdiction of the S. E. C. will thereafter in many cases be less effectively and less efficiently regulated than they are now." Whatever interest may attach to this declaration of individual belief, it will not be mistaken for the voice of the Constitution.[*]

II. The Gulf and El Paso Utility Systems Are Not Retainable Under Clause (B) as Additional Systems With the Virginia Electric System

The Commission's order under Clause (B) of Section 11 (b) (1) required Engineers to dispose of the electric utility systems of Gulf and El Paso and the gas utility system of Gulf on the ground that they were remote from the electric utility system of Virginia, the "single integrated public-

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[*] See the observation of Brandeis, J., in *Lambert* v. *Yellowley*, 272 U. S. 581, 596: "From the authority of these cases Dr. Lambert seeks to escape by pointing out that he is a physician and believes that the use of spirituous liquor as a medicinal agent is at times both advisable and necessary * * *. Of course his belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown to Congress to be the minor fraction of his profession."

utility system" retainable by Engineers (R. 276, 120).[28]

Section 11 (b) (1), as we have seen, requires limitation of the operations of a holding-company system to a single integrated public-utility system. We are here concerned with an exception permitting the retention of "additional" integrated public-utility systems if it is established that the additional systems bear certain operational and geographical relationships to the "single" system. These relationships are set forth in Clauses (A), (B), and (C) of Section 11 (b) (1). It will be noted that an additional system must meet the tests specified in each of the three clauses, which are quoted below:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

[28] The Commission found that the electric utility properties of Virginia (located in the States of Virginia and North Carolina), Gulf (in Louisiana and eastern Texas), and El Paso (in western Texas and New Mexico), and the gas utility properties of Gulf (located in Baton Rouge, Louisiana) each constituted an "integrated public-utility system" as the term is defined in Section 2 (a) (29) (A) and (B), with minor exceptions in the case of the Gulf and El Paso electric systems (R. 256, 140, 130).

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(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The test specified in Clause (B) is one which, on any theory of interpretation, may be applied by simple reference to a map. Under the Commission's interpretation, Clause (B) requires that an additional system may be retained only if it is located in the same geographic area as the single system.

Engineers, however, contends that, at least so far as Clause (B) is concerned, the electric utility systems of Gulf and El Paso and the gas system of Gulf are eligible for retention with the electric system of Virginia. To reach this conclusion it reads Clause (B) as permitting the retention of additional systems that are located in any one state, or in states adjoining any one state, no matter how remote the states in which the additional systems are located may be from the "single" system. Under this interpretation the electric and gas systems of Gulf and the electric system of El Paso, located in Texas and the States of Louisiana and New Mexico, both of which adjoin Texas, may under the standards of Clause (B) be retained with the electric system of Virginia as the "single" system. This in-

terpretation, permitting the retention of additional systems in an area distant from that of the "single" system, will be referred to as the "two-area interpretation." The Commission's interpretation, requiring the combination of the "single" and additional systems to be located in one relatively compact geographical region, will be described as the "one-area interpretation."

The meaning of Clause (B), as the court below said (R. 1215) and as the Commission itself indicated in its opinion (R. 260), is "not free from doubt" when considered apart from context and legislative history. The words of Clause (B) themselves, however, support the view taken by the Commission. As read by the Commission both the phrase "adjoining states" and "contiguous foreign country" have a reasonable point of reference in relation to the state or states in which is located the single system referred to in the body of Section 11 (b) (1). If Engineers is to avoid the extreme construction of treating the phrase "contiguous foreign country" as meaning contiguous to the United States, and construing the phrase "adjoining states" as including a chain of states, each touching one of the other states in the chain,[28] it must use as its point of reference for both phrases "one state" in which one of the additional systems is located. Strained as this

[28] This construction has in fact been urged by some holding company systems.

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construction seems even as a matter of grammatical construction, reference to the context and the legislative history makes it clear that the state in which the single system is located is the only logical point of reference for the two phrases.

This conclusion is reinforced by the fact that Clause (B) does not stand alone. It is one of three standards that are set forth in the conjunctive. Clauses (A) and (C) set forth certain *relationships* which the statute holds must exist *between the "single" system and additional systems.* The fact that Clause (B) is parallel with and serves a limiting function similar to Clauses (A) and (C) in the section indicates that it likewise describes a necessary *relationship* between additional systems and the "single" system—one of geographical proximity.

Thus Clause (A) requires, as a condition for the retention of an additional system, that the latter "cannot be operated as an independent system without the loss of substantial economies" possible through its retention, and it is obvious that distance from the "single" system is an important factor in determining whether there is possibility of loss of economies through severance of common control. Again, Clause (C) requires that the combination of the "single" and additional systems under the control of the holding company be "not so large (considering the state of the art and the area or region affected)" as to have certain un-

desirable effects. It will be noted that the words "area" and "region" are used in the singular, so that the "single" and additional systems must be located in one area or region, not in two or more. This is aside from the fact that the "not so large" standard is to be applied with reference to impairment of "the advantages of localized management," as well as efficient operation and the effectiveness of regulation.

The legislative history strongly supports the conclusion reached by the Commission. The version of the bill which originally passed the Senate (S. 2796, § 11 (b) (3), 74th Cong., 1st sess., 79 Cong. Rec. 9065, June 11, 1935) required the complete elimination of holding companies, except where a first-degree holding company was, according to a certificate of the Federal Power Commission, necessary under state or foreign law "for the operations of a geographically and economically integrated public-utility system serving an economic region in a single State or extending into two or more contiguous States or into a contigous foreign country." This exception was designed for utility companies operating a "single system * * * in contiguous States, the laws of which will not permit merger into a single operating system." S. Rep. No. 621, 74th Cong., 1st sess., pp. 5, 11. The House, however, modified the bill and adopted a substitute which directed the Securities and Exchange Commission to order holding companies and their subsidiaries to limit

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their "operations * * * to a single integrated public-utility system, except that if the Commission finds that it is not necessary in the public interest to so limit the operations of such holding-company system, the order of the Commission shall require such company to take only such action * * * as the Commission finds necessary to limit such operations to such number of integrated public-utility systems as it finds may be included in such holding-company system consistently with the public interest." S. 2796, § 11 (b), 74th Cong., 1st sess., 79 Cong. Rec. 10637, July 2, 1935; *cf.* H. Rep. No. 1318, 74th Cong., 1st sess., p. 17.

The House version had been strongly criticized by members of both Houses. In the Senate debate which preceded the conferences between the two Houses Senator Wheeler read on the floor of the Senate a letter he had received from the then Chairman of the Securities and Exchange Commission.[77] This letter criticized the House bill on the ground that it would have transferred to the Commission an unresolved controversy over a basic question of economic policy, namely, the issue whether excessive diffusion of interests is detrimental to the public interest or whether, as alleged by industry spokesmen, advantageous diversifica-

[77] See statement of Senator Wheeler, 79 Cong. Rec. 10847, and letter from Joseph P. Kennedy to Senator Wheeler, *id.*, p. 10838.

tion of risk results from a combination of utility enterprises in different parts of the country. The criticism was directed both to the resulting difficulties from the point of view of administration and to possible questions of delegation of legislative power. Chairman Kennedy's letter played a prominent part in the Senate discussions which preceded a conference between the two Houses. In the course of the debate Senator Wheeler indicated that he was wholly in accord with Chairman Kennedy's criticisms of the House bill, even going so far as to suggest that the House bill involved an unconstitutional delegation of legislative power to the Commission.[28]

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[28] Referring to the Senate bill Senator Wheeler said:

"I repeat that the section as passed by the Senate did not pass a 'death sentence' on the holding companies. It merely required the companies to give up their control over the operating companies scattered all over the country and confine their appetite for power and their greed for profits to running a single economically integrated system within the confines of a geographic area." (79 Cong. Rec. 10840.)

Asked by Senator Robinson to comment on the statement which "has been made repeatedly that the House amendment would vest in the Commission discretion as to whether holding companies may be abolished or permitted to survive," Mr. Wheeler replied:

"The only guide is the public interest. It is simply provided that if the five members of the Commission decide that a company is in the public interest, it may continue; if they decide it is not in the public interest, it may not continue.

* * * * *

"Mr. Robinson. It gives no definition as to what may

After passage of the bill by the Senate, conferees of the two Houses worked out a substitute bill which was enacted as the Public Utility Holding Company Act of 1935. The conference report made it plain that additional integrated systems were to be retained only if it was affirmatively

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govern their action in determining when the public interest is involved?

"Mr. WHEELER. That is correct.

* * * * *

"Mr. WHEELER. * * * I feel there is no possibility of doubt that the Court would say to the Congress, 'You have abdicated your legislative powers and turned them over to the Commission'; and Mr. Kennedy says it is not humanly possible for the Commission to exercise such powers.

"Mr. ROBINSON. Of course, the instruction that the Commission shall be governed by the public interest is a slight direction, but that of itself involves the exercise of a very broad discretion." (79 Cong. Rec. 10840.)

Later Senator Robinson added:

"Why should not the rule for the government of the Commission in determining that very vital question be specified in the act?" (79 Cong. Rec. 10840.)

In the course of the same debate Senator Wheeler referred to the "additional views" filed by Congressman Edward C. Eicher at the end of the House Committee Report saying that Mr. Eicher expressed "not only his own views but those of other members of the House committee, including Chairman Rayburn" (79 Cong. Rec. p. 10839). Congressman Eicher had voiced criticisms of the House bill somewhat similar to those later expressed by Chairman Kennedy, as illustrated by the following excerpt:

"* * * In other words, it badly shifts congressional responsibility to the Commission without any real declaration of congressional policy. And, insofar as there is any standard provided, it is couched in such a form as to make its

shown, among other requirements, that all of the integrated systems—both the "single" system and the additional systems—were located in the same state or states or in adjoining states or a contiguous foreign country. The conference report summarized this history of Section 11 (b) (1) and stated:

> It may be observed that section 11 (b) in both the Senate bill and the House amendment contemplates the reestablishment of the advantages of localized management in the operating utility industry and the consequently necessary breakdown of the control of large holding companies over geographically scattered operating utility companies. Section 11 of both bills, therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to one integrated public-utility system.
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> To this limitation the Senate bill, like the House bill, allows in section 3 exceptions in

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effective application by the Commission impossible because of the pressure it invites against its application. The enforcement of such provision truly lies within the whim of the Commission and is confessedly of doubtful constitutionality.

"Moreover, if the Congress has not the courage to state a definite policy in regard to the break-up of these huge concentrations of economic power, no administrative commission can fairly be expected to resist the pressures which would inevitably be brought against it to prevent the carrying out of any effective and consistent policy." (H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 47–48.)

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the case of a holding company whose interests are essentially intrastate and in the case of a holding company whose interests are essentially foreign. The House amendment grants what amounts to a further exception when the Commission finds that more than one integrated system may be included in a holding-company system "consistently with the public interest."

The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. Definite exceptions not only provide a satisfactory constitutional standard but also an effective standard for the guidance of both the Securities and Exchange Commission and those holding companies which wish voluntarily to comply with Congressional policy.

The substitute, therefore, makes provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems *under localized management with a principal integrated system*. Under such circumstances the Commission is directed to permit the holding company to retain control of such additional systems, even though not physically integrated with the principal system, provided *all such integrated systems* are located in the same State or States, or in

adjoining States or a contiguous foreign country. (H. Rep. No. 1903, 74th Cong., 1st Sess., pp. 70–71.) [Emphasis supplied.]

It is clear from the conference report that the compromise provision was not intended to permit a holding company to control public-utility companies operating in widely scattered areas. It was partly on this ground that certain representatives who favored the House bill and opposed the Senate proposal also opposed the substitute, specifically asserting that the substitute would in practical effect retain the restriction on a holding company to a single integrated system.[29]

A further clear statement of Congressional intent is contained in a statement by Senator Wheeler, Chairman of the Senate committee which considered the bill and a member of the conference committee. This statement was made in the

[29] See remarks by Representative Huddleston, a member of the House Committee on Interstate and Foreign Commerce and one of the House managers at the conference, 79 Cong. Rec. 14167, August 22, 1935, quoted at R. 265–66; and *cf.* remarks of Representative Cooper of Ohio, also a member of the House Committee on Interstate and Foreign Commerce, *id.*, p. 14166:

"The second condition for more than one utility system exists 'if all of such additional systems are located in one State or in adjoining States.'

"That provision is of little importance since, as stated, most of the utility holding companies have acquired their properties in different territories in order to diversify the risk.

* * * * *

"I submit to you that the exception granted on the basis

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Senate immediately after the passage of the bill and two days before it was signed by the President. Senator Wheeler said:

> Section 11 in the Senate bill, as you will recall, required that a holding company limit its operations to one integrated operating system and to businesses reasonably incidental thereto. The House bill also purported to limit the operations of a holding company to one integrated system, but permitted an exception which allowed the Commission to permit a holding company to control as many systems as it deemed consistent with the public interest. The House bill accordingly thrusts the entire burden of breaking up the giant holding companies upon the Securities Commission without any effective or constitutional standard to guide them in their task and with no concrete congressional sanction to fall back upon to resist the pressures that would in-

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of these three conditions does not materially modify the limitation to one integrated public-utility system, nor will it in any way prevent the dismemberment of practically all utility holding companies."

While Representative O'Connor, who voted for the substitute Section 11 (b) (1), regarded it as a relaxation of the Senate version, he construed it in a manner which supports the Commission's interpretation of Clause "B" in that it permitted "holding companies which are really integrated units and are natural units, to operate in a real concentrated territory without spreading their talons all over the country, with an Insull in Chicago picking up a little power plant in Florida or a Hopson from 61 Broadway, New York City, operating a little plant in Oklahoma at the expense of the consumers and the investors." (*Id.*, p. 14168.)

evitably be brought against the Commission to prevent their taking any effective action. *Since both bills accepted the proposition that a holding company should normally be limited to one integrated system,* my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion *the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems were in the same region as the principal system* and were so small that they were incapable of independent economical operation and if the combination of these small systems under one holding company would not create a corporation so large as to impair the advantages of localized management and the effectiveness of regulation. I consider this a very generous concession upon the part of the Senate. If properly administered, however, this concession should not defeat the purpose of the President to break up the giant holding companies with their undue concentration of economic power and with their absentee management by remote control.

* * * * *

The Senate had to yield on the provision that all holding companies should cease to be holding companies after 1940 unless

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> affirmatively found to be necessary to the operations of an integrated system under the applicable State law. The provisions retained in the bill, however, which require as a general rule the limitation of the holding company to one integrated system and which require that the corporate structure of the holding company be not unnecessarily complicated, should serve to break up all of the unnecessarily large and complicated holding-company empires. (79 Cong. Rec. 14479, Aug. 24, 1935.)

Finally, the legislative intent is set forth in Section 1 (c) of the Act itself:

> * * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section * * *.

These problems and evils include the adverse effect on the national public interest and the interests of investors and consumers which, Congress found (§ 1 (b) (4)), results (or may result)

> when the growth and extension of holding companies bears no relation to economy of management and operation or *the integration and coordination of related operating properties;* * * *

Thus it is abundantly clear that among the several tests of Section 11 (b) (1) which additional systems must meet to qualify for retention with

the "single" system is the requirement that they be located close to the "single" system. The conference report describes the statute as requiring that "all such integrated systems"—the single and the additional systems—"[be] located in the same State or States, or in adjoining States." And Senator Wheeler described the permissible area of operations of the "single" and additional systems as the "same region."

When this test is applied to the proposed Virginia-Gulf-El Paso combination, with Virginia and Gulf 850 miles apart at their closest points and 1,300 at their furthest and with Virginia and El Paso from 1,600 to 1,800 miles apart (Appendix D, *infra*), how could any conclusion be reached other than that the statute required the severance of Gulf and El Paso from Virginia? How could their retention with Virginia produce a combination located in the "same State or States or in adjoining States," or in the "same region"?

An examination of the practical consequences of the interpretation advanced by Engineers reinforces the conclusion from the legislative history. For, as applied to the facts of this case, the two-area interpretation produces a result irrational on its face. With the Virginia electric system (located in the States of Virginia and North Carolina) as the "single" system, and with Gulf and El Paso (in Louisiana, Texas, and New Mexico) as additional systems claimed by Engineers, Engineers could not, under its construction of Clause (B), retain or acquire a second additional system

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in the State of Virginia or the states adjoining it—despite the fact that utility systems in these states would be considerably closer to the "single" system and would thus render the entire holding-company system more compact geographically.[30] Indeed, Engineers' construction of Clause (B) to permit retention of the Gulf and El Paso properties would even exclude, on the basis of that clause alone, any possibility of also retaining along with Virginia's electric properties the Virginia gas system in the heart of its service area. For that gas system, of course, does not adjoin any state in which the properties of Gulf and El Paso operate. Engineers, however, desires to retain the Virginia gas system as well, and in dealing with this property it argues that it may be retained even though it does not adjoin the other additional systems.[31] It is clear that on no interpretation of the statute which has been suggested can Engineers retain both the Virginia gas system and the Gulf and El Paso systems as systems additional to the Virginia electric system.[32]

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[30] Thus, since North Carolina and Maryland do not adjoin each other, Engineers under its construction could not retain additional systems in both North Carolina and Maryland even though such systems might be quite close to the properties of its single system in Virginia and North Carolina and retainable on the Commission's construction.

[31] The retainability of the Virginia gas system under the Commission's construction of the statute is discussed in Part III below (pages 76–91).

[32] If it presses for its interpretation of Clause (B) in order to keep the Virginia electric-Gulf-El Paso combina-

Moreover, the Commission's interpretation of Clause (B) is in accordance with the stated purpose of the conference substitute (pages 64–65, *supra*) to supply "an effective standard for the guidance of both the Securities and Exchange Commission and those holding companies which wish voluntarily to comply with Congressional policy." Under the one-area interpretation, Clause (B), as a mechanical test of retainability, helps to indicate the limits of Commission discretion in the application of the correlative standards of Clauses (A) and (C). Without this indication as to the outside geographical limits of permissible systems, it is questionable whether the above-quoted objective of the conferees could have been fully realized.

Another function of Clause (B) as a mechanical test is to eliminate the necessity of taking extensive evidence in the situations where Congress was convinced that the properties in question were incapable of satisfying its basic integration policies. In fact, in the instant case, Engineers, on petition for rehearing (R. 309), offered to produce testimony for the purpose of establishing that the electric utility properties of both Gulf and El Paso could satisfy the (A) and (C) standards for retention with the electric utility properties of Vir-

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tion, it cannot consistently ask to keep the Virginia gas system. If it desires to keep Virginia gas as an additional system with Virginia electric, Clause (B) requires the divestment of Gulf and El Paso. This inconsistency into which Engineers has been led by its construction of Clause (B) is merely another proof of the unsoundness of that construction.

ginia. The uselessness of taking such testimony is emphasized by the findings of the Commission applying those standards to other possible combinations of systems controlled by Engineers, as well as the character of the testimony which Engineers had introduced concerning those other combinations, particularly with reference to the (A) standard.

On the basis of both Clause (A) and Clause (C) the Commission found that the electric systems of Virginia and of Savannah Electric and Power Company could not be retained by Engineers in the same holding-company system (R. 106–19). This finding assumed Richmond, Virginia, as the headquarters of the holding-company management, and took into account the fact, among others, that the executive offices of the two companies are 443 miles apart, while the electric properties are separated by 315 miles at the closest point and approximately 525 miles at the farthest point (R. 106–19). Engineers did not challenge this ruling in the court below although it had not then sold its interest in Savannah.[11]

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[11] The Commission also made advisory findings that the El Paso electric system could not be retained with that of Gulf, separated from it by 500 miles at the closest point and almost 1,000 miles at the farthest point, with principal offices 750 miles apart. For that purpose, the Commission assumed Beaumont, Texas, present headquarters of Gulf, as headquarters of the holding-company system which might include both Gulf and El Paso (R. 138–46).

Under Clause (A) Engineers' "proof" as applied to Savannah indicated that the distance factor precluded the joint use of operating-company personnel, and the only basis for the claim of loss of economies on divestment was related to the type of activities now rendered to companies in the Engineers system by the service-company and holding-company personnel from New York. If the distance between Virginia and Savannah Electric and Power Company precluded a showing of loss of substantial economies under Clause (A), how much less likely is it that a showing of a loss of economies could be made as a result of the severance of Virginia from the more distant Gulf and El Paso properties?[*]

Under Clause (C) the Commission found that the distance of approximately 400 miles between Virginia and Savannah Electric and Power Company was so great as to preclude a finding that the condition of that clause could be met (R. 112–19). The distance between Virginia and Gulf at their nearest point is 850 miles; between Virginia and

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[*] Where proximity exists between systems, there is likely to be a much closer question as to the standards of Clause (A). The problems resulting under Clause (A) from the joint use of operating-company personnel by systems in the same area are considered in connection with Virginia's gas system (Part III, *infra*). Thus, while distance between properties does not have the almost conclusive significance under Clause (A) that it does under Clause (C), it is, by the very nature of the problem, a matter of major importance.

El Paso it is 1600 miles. On this showing it would, of course, be impossible for the Commission to find that Gulf and El Paso could be retained under Clause (C) or that Engineers could keep them "under localized management with" the Virginia electric property.

In the light of the language of the statute and its purposes as revealed by the legislative history, by practical application and by the standards complementing Clause (B), it seems clear that the statute contemplates the one-area interpretation of Clause (B) adopted by the Commission and sustained below. Under this construction the Gulf gas and electric systems and the El Paso electric system, not being located in a state in which the Virginia electric system operates or in states adjoining such a state, are not retainable as systems additional to it. The Commission, therefore, properly ordered their divestment.[25]

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[25] Engineers has objected to the failure of the Commission to permit the introduction of evidence on the (A) and (C) standards (R. 65–66). All three standards, (A), (B) and (C), must be complied with to permit retention. Thus, if the Commission's construction of Clause (B) was correct, the properties were not retainable and (A) and (C) evidence was properly rejected as irrelevant. In addition, it seems clear from the discussion above that no possible evidence could have satisfied the (A) and (C) standards.

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III. The Virginia Gas Utility System Is Not Retainable Under Clause (A) as an Additional System With the Virginia Electric System

Clause (A) of Section 11 (b) (1) requires, as one of the three conditions which must be satisfied to permit the retention of utility systems additional to the "single integrated public-utility system," that the Commission find that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system." The Commission here found that the retention by Engineers of the Virginia gas properties as a utility system [86] additional to the Virginia electric system would not be barred under Clause (C) or under the Commission's interpretation of Clause (B),[87] but was unable to find that Clause (A) had been satisfied (R. 99–106). In the absence of the latter finding, divestment of the

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[86] The Commission found that Virginia's gas properties constituted an integrated public-utility system as defined by Section 2 (a) (29) (B) of the Act (R. 99).

[87] It has already been pointed out that Engineers has inconsistently claimed the Gulf and El Paso electric systems as systems additional to the Virginia electric system and at the same time urged the retention of the Virginia gas system, although that system is not retainable with Gulf and El Paso as a system additional to Virginia electric under Engineers' two-area interpretation of Clause (B). See page 71 and note 32, *supra*.

gas system was required by the statute. This conclusion was sustained below, Judge Soper dissenting (R. 1220–21).

In the light of the structure of the statute we believe that, if Engineers is to obtain reversal of the Commission's order, it must demonstrate that upon the record the Commission was required to find affirmatively that substantial economies would in fact be lost upon divestment. In other words, Engineers must establish that the facts in the record are so clear and convincing that they left the Commission no reasonable choice but to make a finding that Clause (A) was in fact satisfied.[25]

In considering whether the Commission's action was justified it is necessary first to determine the proper content of the requirement embodied in Clause (A). In this an examination of the legislative history may be of assistance.

As has been noted, the Congress adopted a policy normally limiting holding companies to one system and permitting additional systems only in exceptional circumstances. The underlying economic

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[25] There were some indications in the majority and minority opinions that the Commission made a "finding" that substantial economies would not be lost, and that that finding is to be tested by the substantial evidence rule. We do not believe this to be accurate. The Commission here made no affirmative determination; it held merely that on the evidence it was unable to make a finding that substantial economies would be lost and hence that Clause (A) had been met. In the absence of such a finding divestment was necessarily required.

premise of Section 11 is that an indefinite extension of the field of operations of a holding-company system is not conducive to efficiency, or, in any event, does not result in efficiencies commensurate with the social and economic disadvantage involved. As was said in the report of the National Power Policy Committee:*

> * * * While the distribution of gas or electricity in any given community is tolerated as a "natural monopoly" to avoid local duplication of plants, there is no justification for an extension of that idea of local monopoly to embrace the common control, by a few powerful interests, of utility plants scattered over many States and totally unconnected in operation. Such intensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism inimical to the functioning of democratic institutions and the welfare of a free people. * * *
>
> * * * * *
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> * * * Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason

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* Appended to Senate Report No. 621 (74th Cong., 1st sess.).

> by the rivalry of contending systems. Because this growth has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. Instead, they have too frequently given us massive, overcapitalized organizations of ever-increasing complexity and steadily diminishing coordination and efficiency.
>
> For all this concentration so dangerous to his democracy, the American consumer pays the bill.

This approach finds its reflection in the conference report on the substitute bill finally enacted, which stated:

> The substitute, therefore, makes provision to meet the situation where a holding company *can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems* under localized management with a principal integrated system. (H. Rep. No. 1903, 74th Cong., 1st sess., p. 71.)

Senator Wheeler said that, as one of the "concrete exceptions" to the "proposition that a holding company should normally be limited to one integrated system,"

> the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if [among the other tests] the additional systems * * * were so small that they were incapable of independent economical operation. (79 Cong. Rec. 14479.)

The latter is a strong formulation of the statutory standard. Undoubtedly, in the Congressional view, a strong showing was required to permit retention.[40] The thrust of the statute is toward independence for operating companies, even if they are small in size. Thus, Representative O'Connor, by way of illustration, envisaged the independence of even "a little power plant in Florida" or "a little plant in Oklahoma."[41] And Representative Cooper referred to systems retainable under Clause (A) as "unprofitable companies * * * too weak to stand alone."[42]

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[40] The fact that Congress did not go so far as to adopt an outright prohibition on a combination of gas and electric systems under one holding company does not mean, as Engineers claims, that Congress intended that such joint ownership was always to be permitted under the Act. It signifies no more than that Congress believed that, under some circumstances, the advantages of retention might outweigh those of divestment, and that it therefore preferred the Commission to handle the problem on a case-to-case basis. But it should be remembered that the over-all policy of the statute was to confine holding companies to a single system.

[41] 79 Cong. Rec. 14168.

[42] 79 Cong. Rec. 14165–14166.

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In short, Congress expected that a company able to stand alone—*i. e.*, capable of managing its own affairs—was to be given its independence even if relatively small in size. From the mere recital of the fact that the Virginia gas system had 1940 gross assets of over $6,000,000, operating revenues of over $1,000,000, and gross income of over a quarter of a million dollars (R. 99), it is obvious that an enterprise of substance is being dealt with, one that is of a size amply capable of self-management.

This premise, it is apparent, underlies the test of retainability expressed by the majority below. To make the requisite finding, it said, there would have to be demonstrated that under Engineers' control the gas system would have a "continuing substantial strength" which it would not have independently; that its independence would not reasonably be expected to produce a compensating strength; and that its continued strength through retention would entail no sacrifice by the electric system.

The evidence before the Commission was unequal to the task of establishing such a conclusion. Engineers' contentions were supported solely by opinion testimony given by officers of its system companies that severance of its gas and electric properties from common control would result in certain increased operating expenses. Although the Commission indicated that in some

cases a sufficient showing of such increased expenses might satisfy the test of Clause (A), it found upon examination of Engineers' contentions that they were exaggerated and incomplete and took no account of various countervailing advantages resulting from divestment. In the light of this evidence the Commission held that the standards of Clause (A) had not been met.

Engineers' evidence purported to show that increased expenses of independent operation of the gas and electric systems would total $127,491. Of this amount the sum of $55,969 was attributed to the independent electric system.[*] Although the Commission observed that countervailing advantages would undoubtedly exist which Engineers had not taken into account, it did not subject this figure to detailed analysis. Even if accepted in full, the sum of $55,969 would constitute but three-fifths of one percent of the total 1940 operating expenses of the electric system after taxes and depreciation (R. 788), a proportion so obviously negligible that no finding of substantial lost economies could be based on it. The Commission accordingly gave it no further consideration. (R. 101–103.)

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[*] There was some question whether the "loss of substantial economies" was required by Clause (A) to be shown for the additional system on divestment or, as Engineers claimed, might relate to both the "single" and additional systems. The Commission assumed *arguendo* that the latter interpretation was correct (R. 101–02).

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In the case of the gas system Engineers attempted to show that independent operation would result in increased costs in the amount of $71,522. This figure, which is larger than that claimed for the electric system, and which is applicable to the smaller gas system, was given more detailed examination by the Commission. The Commission agreed that operating expenses of the gas system would to some extent be increased, although it found that Engineers' estimates were, on their face and in the light of cross-examination, exaggerated or unreliable. It concluded that "the record, if given its most liberal interpretation, would not sustain a finding of more than one-half the claimed increased expenses" (R. 105). Since not even the dissenting opinion below took issue with this conclusion, we shall regard it as not subject to challenge here and shall not analyze the facts on which it is based.[*]

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[*] We believe it necessary, however, to correct certain misapprehensions expressed by Judge Soper in his dissent (R. 1220–21). He stated that "the minimum figure accepted by the Commission" is "an annual loss of $91,370, that is $55,969 plus one-half of $71,522," a total, in his view, sufficient to meet the Clause (A) test. As the text indicates, however, the figure was a maximum, not a minimum, and was subject to being offset because of the compensating advantages, discussed *infra*, which the Commission held were likely to result from independence.

The judge stated also that, in addition to the sums just quoted, "there were other estimated losses * * * that relate to consumers' accounting and collection, sales promotion expense and administrative and general expense." In this statement Judge Soper is mistaken. As the record

So limited, the maximum claimed increased operating expenses would result in only a 4.6% increase in gas operating expenses for 1940.

Engineers has argued with superficial plausibility that the relevant criterion is the effect upon net income, but that argument involves the fallacious assumption that in dealing with a complex business it is possible to isolate the effect of a certain amount of management and overhead expense in its application to ultimate net income. The fact that the percentages of gross expenditures are so small, and that there are so many intangibles which must be taken into account in attempting to trace the ultimate relation of such expenditures to net income (see *infra*), shows the unreliability of Engineers' basic hypothesis. In light of all these factors, the effect of these alleged increased expenses upon the net income certainly should not be large enough, when viewed in the context of the statute, to be determinative."

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clearly shows (R. 859), these expenses are included within the quoted sums and are not additional to them. In fact, these three items comprise the total of the claimed increased expense to the independent gas system (R. 859).

" Obviously the impact of increased operating expense to the independent gas system is most properly compared with the item of which it will form a part—the operating expenses of the present gas system. For that reason a comparison of increased operating expenses with gross or net income (respectively 13.3% and 29.8%) has no bearing on the actual result. As the subsequent discussion shows, even these percentage comparisons are further reduced by other savings and a consideration of countervailing advantages resulting from divestment.

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However specific in dollar figures is the opinion testimony of Company witnesses, it amounts in substance to nothing more than a repetition of the dubious economic philosophy which Congress had rejected in adopting the Act, namely, the argument of holding company managements that economy of operations in the industry had been advanced by indefinite expansion of the holdings under a single management, and that any contraction would necessarily result in a loss of economies.

The Commission concluded further that "the loss of economies would in fact be less than such increased expenses" (R. 105). This was based on the Commission's premise that the term "lost economies" comprehends more than merely "increased expenses." The legislative history cited above and the test of Clause (A) as formulated by the majority of the court below clearly require the Commission, in appraising the possibilities of an independent life for the divested system, to consider not only increases in cost which divestment would entail but also new-found advantages which it might achieve. The Commission had to scrutinize the over-all result of divestment instead of confining its attention, as Engineers has done, to the disadvantage alone.

Important among the advantages which the Commission held could be anticipated upon the severance of the gas and electric systems from

common control were the possibilities of substantial development by the gas system which would not otherwise exist. Particularly was this so in view of the fact that the electric and gas systems in the same service area have been inherently competitive in nature, so that the possibility of growth of the gas system might well be enhanced when it is freed of the same control as the larger and more remunerative electric system." The effect of joint ownership on gas properties has been the subject of some concern to state utility

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"Thus, in testifying with respect to the Gulf gas and electric combination, the treasurer of Gulf, when asked why the need for separate service buildings for independent gas and electric systems could not be obviated by the gas system's renting a portion of the service building now used jointly, replied (R. 1176–77):

"A. * * * if I had anything to do with it I don't believe you would keep it there.

"Q. That is because you wouldn't want your competitor in the same building?

"A. That is because if two interests got together, why, I don't believe they get along very well. We have a common interest now and it would be separate interests under this proposed gas company being a separate company. There wouldn't be anything in common.

"Q. Would you say that if the gas department were independent that they would have conflicting interests with the electric operations?

"A. I think the gas, another gas company would try to do its best job, and they may want to do things differently than they are being done now.

"Q. You wouldn't say that the interests of a gas utility and an electric utility though would run cross current, would you?

"A. I believe they would if they were separate."

commissions. See *Helena Light & Railroad Co.*, PUR 1920 D, 668 (Mont); *Twin State Gas & Electric Co.*, 25 NHPS Comm. Rep. 277 (1943)."

Furthermore, certain increased expenditures of the gas system might well be of the type which would produce gains in income. Thus, at present the executives of Virginia devote about five percent of their time to the gas system's affairs (R. 1172). Additional funds spent to secure executives who would devote their full time and energy to the affairs of the gas system exclusively may well result in compensating gains and cannot be regarded as solely increased expenses (*cf.* R. 861, 105). Increased advertising costs, too, may bring in a greater volume of business and may thus be well spent (R. 859, 104). In addition the allocation of costs between the two jointly operated systems has repeatedly required the attention of executives. The methods of allocation were re-

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"The Montana Commission made the following comments:

"It is almost superfluous to say that the evident inertia of the gas service, its deteriorated plant and relatively failing patronage result immediately from the fact that it has no competition. Its natural competition, the electric utility, being owned by the same company, favored by the management and enjoying certain popular advantages, has muffed out the spark of incentive to increased business and improved service. The company is indifferent to better gas service because its failure in this department results in gain to the electric department, whereas an independent gas entrepreneur would strive to occupy the electric field."

peatedly changed; some of these methods were admittedly erroneous and affected the rate structures of the two operations (R. 1158, 1161–66, 1177–78, 1180–85). There was a failure to allocate certain specific costs (R. 1180, and *cf.* R. 823 with R. 1160). There is at present a continuous expense of making allocations between the two systems (R. 1159–60). The divestment and independent operation of the gas system would eliminate the entire problem of allocation and the attendant expense.

The Commission held that such considerations must be taken into account in determining whether divestment would produce only increased expenses or whether some gains and economies could also be expected.[46] The dissenting opinion at once

[46] The dissent notes (R. 1221) that in rejecting Engineers' excessive estimates of increased expenses the Commission did not find "the correct figures." It is obvious, however, from the approach of the Commission in its opinion that the issue is not one that can be so precisely resolved. The problem involves a judgment as to future operations, and a refinement of computations to the last dollar or penny is, if anything, somewhat presumptuous. While useful as a starting point, such figures, necessarily prospective in character, were in the Commission's judgment not susceptible of computation in minute detail. In addition, some of the factors discussed by the Commission and noted here, such as the advantages attainable on independence, while obviously of far-reaching importance and great effect on the business and earnings of the two systems, are inherently incapable of being reduced to dollars-and-cents terms. They are necessarily subject to an over-all judgment. Finally, it should be noted that the Commission's opinion

overemphasized the "undisputed" evidence with respect to economies (R. 1220) and rejected the Commission's references to the countervailing advantages of severing the gas and electric system as a "conjecture * * * entirely without support in the evidence" (R. 1221). It is submitted that this analysis overlooks both the fact that the "undisputed evidence" in question was nothing more than interested opinion proceeding from a premise hostile to the economic philosophy of the Act and the fact that the Commission was exercising an informed judgment pursuant to the authority vested in it by the Act. *Cf. McLean Trucking Co., Inc.* v. *United States*, 321 U. S. 67, *infra*, note 50. Surely it was not contemplated that the economic philosophy which favored indefinite extension of utility operations and resistance to all efforts to contract their scope, after having been rejected by Congress, should nevertheless be determinative of Commission action merely because reduced to dollars and cents estimates and offered in evidence before the Commission.

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stated that "the figures claimed for the gas operations would, *if accurate and in the absence of any benefits resulting from separation*, afford an impressive basis for finding a loss of substantial economies to that system" (R. 103). When upon analysis, however, these estimates were found to be inaccurate and to ignore the countervailing benefits, so that the Commission was clear that no finding of substantial lost economies could be based upon them, it was not necessary for the Commission to reach a precise dollars-and-cents figure on the extent of the reduction.

After examining all these factors the Commission determined that the showing of increased expenses did not amount to proof of a loss of substantial economies and did not warrant its finding that Clause (A) had been met.

It is clear from the foregoing discussion that the problems raised by Clause (A) are complex and technical in nature and are not readily susceptible of absolute proof. "Whether economy is achieved by centralized control is always a doubtful question * * *."[*] Further, the Commission under Clause (A) was required to compare the future operation of the gas and electric system (1) as independent entities and (2) under common control. It therefore had to make a prediction or estimate of a future course of events.[**] Engineers

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[*] See *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, 152 (C. C. A. 2), certiorari granted on a petition raising constitutionality only, No. 1, present Term.

[**] Concerning determinations of a similar character, it has been said:

"[The Federal Communications Commission] was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just *because the findings are necessarily prospective; time alone can decide their success or their failure.*"

National Broadcasting Co., Inc. v. *United States*, 47 F. Supp. 940, 946 (S. D. N. Y.), affirmed, 319 U. S. 190; *cf. McLean Trucking Co., Inc.* v. *United States*, 321 U. S. 67, 89:

"Necessarily in its inquiry the [Interstate Commerce] Commission had to speculate to some extent as to the

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here is faced with the task of establishing that on the record the Commission was obliged to make the prediction that substantial economies would in fact be lost by divestment—in other words, that Clause (A) had undeniably been satisfied. We submit that upon the record Engineers can not demonstrate that the Commission was required to come to this conclusion.

IV. The Question of Mootness of the Commission's Holding Concerning the Application of the "Other Business" Clauses

The Commission's order directed Engineers to dispose of the traction properties operated by Virginia Electric and Power Co. (R. 160–2), and directed El Paso of Delaware to dispose of the traction and toll bridge properties operated by El Paso of Texas and the El Paso and Juarez Traction Co. (R. 160–1, pars. 3 and 4). In addition, the Commission gave what we regard as advisory opinions to the effect that if Gulf instead of Virginia were to be the principal system it would be necessary under the "other business" clauses for Gulf to dispose of certain water and ice properties. Since the Commission's order is

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future consequences and effects of a present consolidation. But it based its judgment on available facts as to present operations and business practices and past experience with transportation operations and analogous transactions."

Cf. also *Market Street Ry. Co.* v. *Railroad Commission of California*, Nos. 510–511, last Term, decided March 26, 1945.

posited on the Virginia Electric system as the principal system, its order specifically requires the divestment of the traction and toll bridge properties of Virginia and El Paso but contains no mention of the disposition of the "other businesses" of Gulf except in a general direction that all the properties of Gulf be disposed of (R. 160–1). The court below reversed the Commission's order in this respect (R. 1229), holding that insofar as the traction properties of Virginia are concerned the Commission had applied an erroneous construction of the "other business" clauses, and that under proper standards substantial evidence was presented from which the Commission might have found that the retention of the transportation business was authorized under the Act. The court then stated, "A similar ruling would be required, if the court should pass on the findings of the Commission in regard to the other businesses which Gulf States and El Paso, respectively, desire to retain." After the decision of the court below, the transportation and toll bridge properties of El Paso were disposed of, and later the transportation properties of Virginia were disposed of, so that Engineers has complied with all portions of the order requiring it to dispose of other businesses.[41] See pp. 19–20, *supra*.

[41] The order also directs the disposition of all interest in Baton Rouge Bus Co., and this company was disposed of prior to the decision below.

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The case would thus appear to be moot in this respect unless Engineers is correct in its contention that its petition for review may properly draw in question the propriety of the Commission's advisory findings with respect to the other businesses of Gulf, namely, the water and ice properties. We believe that these advisory findings are not subject to review. Cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618–619, *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571.

This aspect of the case might also be saved from mootness in the event that it should be held that Engineers is entitled to an order in the alternative to limit itself either to the Virginia electric system or the Gulf electric system as its single system. In that contingency the decision of the court below on this point may be held to announce a rule requiring the Commission's order to follow the court's views as to the interpretation of the "other business" clauses in determining whether to permit the retention of Gulf's ice and water properties in the event (however unlikely) that Engineers should choose to retain the Gulf electric properties as its single system. If that was the ruling of the court below we believe it would presently be subject to review.

Against the possibility that this Court should hold that the disposition of the traction and toll bridge properties of Virginia and El Paso does

not render the case moot in respect of the "other business" clauses, we shall discuss the construction of the "other business" clauses adopted by the Commission and the reasons why we believe the Commission's construction was correct and that of the court below erroneous. Since discussion by the Commission and the lower court was primarily in terms of the transit properties, we shall continue the discussion in those terms despite the fact that these properties have already been disposed of.

V. The Commission's Construction of the "Other Business" Clauses To Hold That the Virginia Transportation Properties Are Not Retainable With the Virginia Electric System Was Correct

Section 11 (b) (1) makes it the duty of the Commission to require each registered holding company to take such action as the Commission finds necessary to limit the operations of its holding-company system to a single integrated public-utility system "and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system." This is the first provision of the statute relating to "other business." Then, following the (A)-(B)-(C) clauses with reference to the retainability of additional utility systems, there appears the so-called "second other business" clause: "The Commission

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may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

The Commission, construing these "other business" provisions to permit the retention of a non-utility business only when that business is related to the operations of a retainable utility system in such a manner as to aid those utility operations, required Engineers to divest itself of its interest in the trolley and bus properties of Virginia (R. 85–98). It has not been disputed that, if the Commission's construction of the statutory standards is correct, these transportation properties may not be retained.[11] The court, however, re-

[11] Virginia's vice-president in charge of the transportation business admitted that "the problems are so different that it is better to have a man devote his time to the study of transportation problems, and let someone else devote their time to the study of the electric problems, within the limits of the actual operations" (R. 1179). The record shows also that the demand of Virginia's transportation business for energy is only 3.9% of the Virginia electric system's output (R. 1179). The transportation business is managed by just one man (R. 1192–93), and the officers of Virginia devote only a small percentage of their time to it (R. 1186).

jected the Commission's construction and held that no relation to the operations of a retainable utility property need be shown. The Congressional intention, the court stated, was "to forbid the divestment of other businesses, not detrimental to the functioning of the principal system, if retention will serve the interests of the general public or the interests of investors or consumers, irrespective of the functional relationship between these businesses and the principal system" (R. 1225). On this basis the court reversed and remanded the Commission's orders for a determination whether under the court's construction of the statutory standards Virginia's transportation properties could be retained by Engineers.[48]

It is our contention that the court erred in its construction of the statutory standards.

The construction of the "other business" clauses adopted by the court below is at variance, we submit, with the general purpose of Section 11 (b) (1), which is to confine each holding company system to related operating properties. Congress effectuated this general purpose by limiting the operations of each holding-company system to a "single integrated public-utility system" with narrowly defined exceptions. The basic criterion

[48] Our argument in this portion of the brief is limited to the transportation properties of Virginia. As to the gas appliance business of Virginia and the remaining non-utility businesses in the Engineers system of which Engineers was ordered to divest itself, see note 9, p. 16, *supra*.

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applicable to those exceptions, whether for additional utility systems or for non-utility businesses, is a test of relationship to the "single" utility system. Additional public-utility systems are ruled out by the strict standards of the (A)–(B)–(C) clauses unless they bear a close geographic and economic relation to the operations of a retainable utility system. Similarly the ultimate findings which the Commission must make to justify the retention of "other businesses" is that they are "reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems." That the "other business" clauses are governed essentially by the same philosophy of relation to the operations of a retainable utility system as the (A)–(B)–(C) clauses is borne out by Section 1 (b) (4) of the Act. Congress has there declared that the national public interest and the interests of investors and consumers are or may be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties."[44] The similarity between the (A)–(B)–(C) clauses and the "other business" clauses in this respect is borne out also by the last sentence of Section

[44] In Section 1 (c) Congress declared it to be "the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section."

11 (a) of the Act, which makes it the duty of the Commission to investigate every registered holding-company system for the purpose of determining, among other things, the extent to which "the properties and business thereof [may be] confined to those necessary or appropriate to the *operations* of an integrated public-utility system."[55]

The language of Section 11 (b) (1) itself is entirely consistent with this interpretation. The first "other business" clause specifies in terms that the non-utility businesses sought to be retained shall be reasonably incidental or economically necessary or appropriate *"to the operations* of such integrated public-utility system." The second "other business" clause likewise specifies that the Commission may permit as reasonably incidental or economically necessary or appropriate *"to the operations* of one or more integrated public-utility systems" the retention of an interest in any non-utility business which it finds "necessary or appro-

[55] Note in addition the comparison made between Clause (A) and the "other business" clauses in Judge Soper's minority opinion on the retention of Virginia's gas system as an additional system: "* * * it is evident that Congress had the same idea in mind in its reference to substantial economies in paragraph (A) as it did in the last sentence when it directed the Commission, under certain circumstances, to permit the retention of other businesses as economically necessary or appropriate to the operations of an integrated system if found necessary or appropriate for the protection of investors or consumers" (R. 1221).

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priate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems." The court below rested its decision exclusively on the standards set forth in the latter portion of the second clause. This, however, construes the statute as if it provided simply that the Commission shall limit the operations of each holding-company system to a single integrated public-utility system and any other businesses whose retention "the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers." The court, in other words, gave no effect to the words "reasonably incidental, or economically necessary or appropriate *to the operations*" of one or more integrated public-utility systems, which appear in the first "other business" clause as well as the earlier portion of the second.

On the other hand, the Commission's construction gives full weight to both "other business" clauses and to all parts of each clause. Its construction has regard to the requirement of relation to the operations of a retainable utility system and also to the public interest standards set forth. Thus, in its opinion, the Commission stated (R. 86–87):

> Moreover, Congress did not say that "the Commission shall permit the retention of a business which it finds to be necessary or

appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems." Rather it instructed us to examine these factors in determining whether a business is retainable as *reasonably incidental or economically necessary or appropriate to the operations of an integrated utility system.*

The questions before us, therefore, are not merely, as respondents suggest: Is the retention of this business appropriate for the protection of investors? or, Is the retention of this business appropriate in the public interest? or, Is the retention of this business detrimental to the proper functioning of an integrated utility system? Rather, our fundamental inquiry is: Having in mind the protection of investors, the public interest and the proper functioning of an integrated utility system, is the retention of a particular non-utility business reasonably incidental or economically necessary or appropriate to the operations of a retainable utility system?

In short the difference between the point of view of the Commission and the court below is that the Commission construed the public interest clauses in the light of Section 1 of the Act and the general policy of the statute, as it was required to do by Section 1 (c), whereas the court below construed the public interest clauses according to what it regarded as the "ordinary acceptation" (R. 1228)

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of the term, a concept in which it found room for a philosophy Congress had rejected in passing the Act.

Aside from harmonizing with the objectives of the legislation, the Commission's construction has the additional merit of being relatively definite in application, in contrast to the vaguer concept imposed by the decision below. The standard of relation to the operations of a retainable utility system, which was rejected by the court, is a fairly definite criterion, which can be administered with a fair degree of certainty. This appears from the Commission's finding that the electric appliance and ice businesses of Virginia may be retained as "other businesses" because they are related to the operations of Virginia's electric utility business, the appliance business being operated to encourage the use of electricity and the ice business to heat and cool the electric utility's building. Similarly, in the integration proceedings with respect to The North American Company the Commission permitted retention of a steam heating business augmenting the heating service of a retainable utility, a coal company, 80 percent of whose output was used by the utility, and a small railway freight line so long as it continued to be used primarily for hauling the coal company's coal; the holding company, however, was required to divest itself of its interest in a securities company, a land and development company formed to acquire land for a hydro-electric plant which was never built, and

another coal company, on the ground that they were not related to the operations of the retainable utility company. *North American Co.*, Holding Company Act Release No. 3405, affirmed, *North American Co.* v. *Securities and Exchange Commission*, 133 F. (2d) 148 (C. C. A. 2), certiorari granted on a petition raising constitutionality only, No. 1, present Term.

On the other hand, the construction of the court below would relegate the Commission to a standard of "public interest" less definite in content.

It is difficult to predict precisely how the court below expected the Commission to apply the standard suggested in its opinion. Although this was doubtless not intended, the opinion leaves room for an argument that the Commission would be required to resolve as an original matter the question of economic policy which we believe was determined by Congress, namely, whether it is desirable in the interest of diversity of investment, or perhaps merely to avoid disturbing the status quo, to permit holding company systems to retain investments in other businesses not related to the operation of their retainable utility properties, or whether it is desirable to limit the operations of the system to what is substantially one business. Such an inquiry might require a repetition of the type of studies underlying the Congressional findings in Section 1 of the Act, or at least a fresh examina-

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tion of the legislative studies supplemented by similar material. However, it is more reasonable to construe the opinion as requiring the Commission to examine the problem of adverse effect of particular businesses upon the holding company system, and to consider, in that connection, possible distinctions between businesses which, though not utility as defined in the Act, are subject to rate regulation under state law, and those which are not so regulated; between businesses which are relatively stable and those subject to extreme fluctuations with the business cycle; between businesses which have reached maturity or are contracting and businesses which are rapidly expanding and are likely to require for their development substantial amounts of additional capital. There is the further problem as to whether the Commission would be drawing such distinctions as a matter of delegated power of a legislative character or would be deemed to be acting in a quasi judicial capacity on the basis of specific material appearing in the record of each proceeding. Some such policy judgment on the part of the court is suggested by the observation in its opinion that the association of Virginia's electric and transportation businesses "does not appear to have involved the major evils which the Act was designed to eradicate" (R. 1229). The administrative task and the pressures to which the administrators would be subjected by such an

indefinite grant of power would be extremely burdensome. So construed, moreover, Section 11 (b) (1) would be subject, at least to some extent, to the same criticisms as were leveled at the House-approved bill, where the only standard governing the retainability of non-utility businesses was "the public interest." (See note 28, p. 62, *supra.*) The then Chairman of the Commission objected to that bill on the ground that it furnished "no effective standard to guide the Commission." Letter from Joseph P. Kennedy to Senator Wheeler, quoted at 79 Cong. Rec. 10838. And Senator Wheeler himself likewise objected that the bill "specifically hampers the Commission in dealing with these nonutility interests." "Instead of Congress adopting a definite policy with regard to these speculative, nonutility activities," he said, "the House section shifts the entire burden to an administrative Commission, and then makes it practically impossible for the Commission to do anything about cleaning up the situation." 79 Cong. Rec. 10847.[29]

[29] These statements were made by Senator Wheeler in criticizing the House-approved bill, which provided: "The Commission shall not * * * require any company to divest itself of any interest in or control over (1) persons or property other than a public-utility company or the utility assets of a public-utility company unless the Commission finds that such interest or control may not be retained consistently with the public interest * * *" (S. 2796, Section 11 (b), Union Calendar No. 451, accompanied by H. Rep. No. 1318, 74th Cong., 1st Sess. (1935) at p. 17).

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The fact that the bare "public interest" standard of the House-approved bill was dropped in conference in favor of the present "other business" clauses indicates that the conferees were sensitive to these trenchant criticisms made both by the senator in charge of the bill and by the head of the agency designated to administer it. And, when these clauses are read, as they must be, in the context of Section 11 and the purposes of the Act as a whole," the conclusion seems inescapable that the solution arrived at by the conferees was to apply the criterion of relation between the non-utility business sought to be retained and the operations of a retainable utility system—a criterion at the same time more con-

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" The lower court's reference to the "ordinary acceptation" of the standards of "public interest" and "protection of investors and consumers" in the second "other business" clause (R. 1228) is in contract with this Court's holding that the "public interest" standard in Section 20a of the Interstate Commerce Act must be read against its statutory background. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25. *Cf.* also *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–51, where this Court recently stated that "courts will construe the details of an act in conformity with its dominant general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." And see *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 47.

sonant with the purposes of the legislation and more definite in nature."[28]

The court likewise erred, we submit, in concluding that the Commission's construction was inconsistent with the legislative history. The court relied on an amendment by Senator Minton which permitted the retention of an interest in any non-utility business "if the Commission finds that such business is affected with a public interest and its rates or charges are regulated by law, and that the retention of such interest in such business is not detrimental to the proper functioning of a single geographically and economically integrated public-utility system." 79 Cong. Rec. 8849. Engineers contends that this amendment, which was in the bill as it passed the Senate,[29] indicates an intention to permit water and transportation properties to be retained, and points to the fact that the amendment was accepted by Senator Wheeler. Although this aspect of the legislative history is not unequivocal, the ultimate fact remains that the Minton amendment was deleted

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[28] It is also clear from Section 11 (b) (1) and the statute as a whole that the "other business" clauses represent an exception to the general policy of the Act. As with Clauses (A) and (B), therefore, they must be strictly construed to effectuate the statutory intention if there is any doubt as to their meaning.

[29] S. 2796, § 11 (b) (1), 74th Cong., 1st Sess., passed by Senate June 11, 1935, 79 Cong. Rec. 9065, and referred to House Committee on Interstate and Foreign Commerce, June 13, 1935, 79 Cong. Rec. 9251.

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and the second "other business" clause was substituted in conference without explanation. The criticisms of the House bill on the score of indefiniteness may have been recognized as also at least partially applicable to the Senate bill with the Minton amendment. It will be recalled also from the discussion of the (A)–(B)–(C) standards, *supra*, pp. 59–69, that in the Senate debate which immediately preceded the conference there was considerable emphasis upon the desirability of framing standards for Commission action which would not involve a delegation of discretion to the Commission unduly broad both from the point of view of constitutional problems and the difficulty of resisting "the pressures which would inevitably be brought against [the Commission] to prevent the carrying out of any effective and consistent policy" (see p. 63, n. 28, *supra*). Consequently, it would seem that the conference substitute as to other businesses was adapted both to broadening the types of additional businesses which might be kept and to defining more narrowly the standard applicable to the retention of any particular business. In other words, there was complete rejection of the approach followed in the Minton amendment. If Congress, after debate had focused on the problem of sufficiently definite standards, had intended to adopt a standard with reference to the retainability of non-utility businesses so inconsistent with the con-

cept of operational relationship which we have seen is interwoven into the entire fabric of the Act, we think it would have announced its intention to do so more explicitly, either in the language of Section 11 (b) (1) itself or in the conference report.

Thus, the legislative history, evidencing as it does the refusal of Congress to accept the tests proposed by Engineers,[40] fortifies the Commis-

[40] In the court below Engineers also attempted to trace the "other business" clauses to an early Senate bill which never passed either House. S. 1725, 74th Cong., 1st sess., introduced February 6, 1935. Section 8 (a) of that bill permitted a holding company to retain only (1) interests in a gas or electric utility; "(2) any other business carried on by a public utility company exclusively in a State or States where the carrying on of such business by such company is expressly authorized by the State Commission; and (3) such other business reasonably incidental to the foregoing as the Commission by rule, regulation, or order may permit as necessary or appropriate in the public interest or for the protection of investors or consumers and not in contravention of the provisions of this Act." An interpretative report accompanying S. 1725 referred to Section 8 (a) as designed to harmonize with any state policy fostering the carrying on of traction or water businesses by utilities. Hearings before Senate Committee on Interstate Commerce, S. 1725, 74th Cong., 1st sess., pp. 55–56. Engineers infers that this intent ascribed to Section 8 (a) of S. 1725 was imported into Section 11 (b) (1) as enacted, because both sections refer to reasonably incidental businesses and contain the general standards of public interest. This, of course, is fallacious. The provisions of Section 8 (a) aided in carrying out the policy referred to in the interpretative report because they expressly provided for retention of utility properties (in the ordinary

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sion's position that the criterion under the "other business" clauses as enacted is relationship to the operations of a retainable utility system.

Nor is the Commission foreclosed from adopting its present construction of the "other business" clauses merely by the fact that, as the court below pointed out (R. 1226), the Commission in an early case took a view of those clauses which was not based entirely on the test of relation to the operations of a retainable utility system. *American Water Works and Electric Co., Inc.*, 2 S. E. C. 972, 983–85. After considering a voluntary plan of reorganization submitted by American Waterworks under Section 11 (e), the Commission in its opinion added certain statements in response to the company's request for a finding that upon consummation of the plan the company and its subsidiaries would in all respects comply with the integration and simplification standards of Section 11 (b). The substance of those statements was that certain transportation businesses could be retained as necessary and appropriate in

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sense of the word "utility") authorized under state law, and not because of the "reasonably incidental" clause or the general test of public interest. When Section 8 (a) (2) was removed from the bill, the language of Section 8 (a) (3) was placed in juxtaposition with a test of relationship to electric and gas operations alone. This clearly evidenced abandonment of the earlier intention to conform to any state policy which might authorize the retention of traction and water properties.

the public interest and not detrimental to the proper functioning of the holding company's integrated utility system, because they were in the nature of an inheritance from an earlier age when they were more important than the business of electrical distribution, and because of the minor importance of the holding company's interest in those businesses as well as the difficulty of satisfactorily disposing of them. Water properties were permitted to be retained principally because they had provided a stable source of income.

The *American Water Works* case was decided in 1937, prior to this Court's decision in *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, upholding the constitutionality of the registration provisions of the Act. At that time American Waterworks was one of the few registered holding companies of any size as well as the first holding company to submit a voluntary plan of reorganization under Section 11 (e). The Commission's experience under Section 11 was very limited—although it should be noted that even then the test of relationship to the operations of a retainable utility system was not entirely ignored in the Commission's opinion.[41] As the Commission accumulated experi-

[41] Certain water, coal and appliance businesses were permitted to be retained because they bore "an intimate relationship to the operations of the gas and electric utility companies" (2 S. E. C. at 984), and certain agricultural

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ence and insight into the administration of Section 11 and the Act as a whole, it adopted a different view of the "other business" clauses, and the test of relation to the operations of a retainable utility system has been applied by the Commission, at least since the *North American* case (pp. 101–102, *supra*). It now believes that test is more consonant with the legislative intention. *Cf. Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90.

As we have shown, our principal difficulty with the opinion of the court below is that it wholly fails to take into account the language "reasonably incidental, or economically necessary or appropriate to the operations" which appears in both the "other business" clauses. In addition, the court construed the words "may permit" in the second "other businesses" clause as meaning "must," although, as the court said, those words "seemingly indicate a permissive authority rather than a mandatory duty." (R. 1225, n.) It is our view that if there is any warrant for construing the second provision dealing with other businesses as authorizing an exception from the overall policy of the Act of limiting holding company systems to related properties, then the clause in question con-

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and real estate properties were required to be divested after a reasonable period of time as not reasonably incidental or economically appropriate to the operations of the holding company's utility system.

fers the kind of a broad administrative discretion which is customarily and appropriately introduced by the word "may" rather than "must," and there is no reason to suppose Congress did not use the word in the usual sense.

For if, as the court below seems to hold, the Commission is authorized because of findings as to public interest or the interest of investors or consumers, to permit the retainability of non-utility properties although wholly unrelated to the operations of any retainable integrated system, we believe it incontrovertible that those standards must be interpreted in the light of the overall policy of the Act, and that that policy is, *prima facie* at least, to confine each holding company system to a single integrated system and related properties. As the clause permits exceptions from otherwise applicable legislative policy on the grounds of public interest, the range for administrative discretion is necessarily broad. Contrary to the intimations in the opinion of the court below, we believe that that court's interpretation of the "other businesses" provisions necessarily highlights the word "may" in the second "other businesses" clause as emphasizing the breadth of discretion conferred on the Commission under that interpretation.

The court, while referring to "may permit" and noting that these words "seemingly indicate a

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permissive authority rather than a mandatory duty," nevertheless rested a contrary interpretation upon what it assumed to be the views of the Commission. But the language which the court quoted from a prior Commission decision was merely that where the Commission has found that the specified conditions for retention are met, then the Commission "must" permit retention of the other business.[a] It should also be noted that the more precise standard for retainability which the Commission has adopted tends to minimize any distinction between "may" and "must." The Court of Appeals' opinion, however, virtually read the word "may" out of the statute, and did so despite its adoption of a standard for the retainability of other businesses which in itself permits a greater latitude for discretion than that which the Commission had adopted.

In urging that the word "may" does in this context indicate a "permissive authority" and that there is no justification for not giving it its normal permissive meaning, we nevertheless recognize that there is a sense in which the word "may" always means "must" as applied to any standard for the exercise of administrative discretion. Thus, once the administrator is satisfied

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[a] See the excerpt from the Commission's decision in the *United Gas Improvement Company* case, 9 S. E. C. 52, quoted by the Court of Appeals at 138 F. (2d) 1010 (R. 1223).

that a company subject to regulation brings itself within applicable standards the administrator cannot arbitrarily deny the benefit of a statutory permission or exception.

As applied to this case, whether we adopt a construction which authorizes the Commission to create exceptions from the general policy to limit holding company systems to related properties, or one which construes the public interest standards in the light of that general policy, it would have been the duty of the Commission to permit the retention of Engineers' transportation business if the Commission had been satisfied that the public interest and the interest of investors and consumers would have been advanced thereby and that such retention would not have been detrimental to the proper functioning of its integrated system.

However, the Commission did not make such findings and, in fact, specifically concluded that retention of that traction business would be detrimental to the public interest.[48] (R. 93–94.)

Despite specific findings by the Commission that under its view of the public interest standards the

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[48] Insofar as the case is actually before the Court on the question of the ice and water properties of Gulf (see p. 93, *supra*), it should be noted that the Commission specifically found retention of the ice properties was "detrimental to the proper functioning of Gulf's electric system" (R. 127) and made a less specific reference to the advantages of separation in the case of the water properties (R. 125).

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combination was detrimental,"[*] the court reviewed the Commission's determination and clearly indicated its belief that the Commission's judgment as to compliance with those standards was erroneous. While disclaiming an intention to make the ultimate decision itself, the court nevertheless stated

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[*] Thus the Commission in its opinion stated (R. 93–94):

"Not only have respondents failed to show that the transportation business is reasonably incidental or economically necessary or appropriate to the operations of Virginia's electric system, but the record discloses that the coexistence of these properties under one ownership has been detrimental to the proper functioning of the electric system and adverse to the interests of consumers and investors. Thus, much of the railway property has been carried in the electric plant account. The effect of this practice on the rates of the electric system has not been appropriate for the protection of the electric consumer. And the proper functioning of the electric system was impaired by an allocation of interdepartmental charges under which the transportation properties were charged considerably less than the over-all cost of the electric energy obtained from the electric system, and substantialy less than the the over-all cost for the use of the other facilities of the electric systems. While respondents claim to have corrected exceptionable practices of this character, it is not clear that the changes completely eliminate the improprieties. On the other hand, it is certain that these practices will be ended by complete divestment of the transportation properties. Moreover, the difficulty and expense of properly allocating charges between the two dissimilar businesses and the advantages accompanying undivided attention by the company's executives to the electric operations, while not conclusive, are further considerations urging a severance of the transportation properties in the public interest and for the protection of investors and consumers."

that "substantial evidence was presented from which the Commission might have found that the retention of the transportation business was necessary in the public interest or for the protection of investors or consumers, or if not necessary, at least appropriate for these purposes in the ordinary acceptation of these terms" (R. 1228). The court referred specifically to the arguments Engineers had made as to the assumed benefits of historical association, alleged increased expenses of separate operation and assumed losses which separation would cause to Virginia. Despite the fact that the Commission had considered all of these arguments and found them baseless, the court indicated that the arguments were persuasive to it in the light of its own judgment concerning what constituted the public interest. The fact that Engineers has voluntarily sold the transportation properties after having prevailed upon the court below to accept its arguments certainly casts doubt on its argument as to the deleterious effects of separation of the two properties even from a strictly business point of view.[*]

The disposition of the traction properties would seem to indicate a change on the part of Engineers

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[*] Because of the disposition of the traction properties, we shall not discuss Engineers' arguments in detail or point out as we pointed out to the court below (see also the Commission's opinion) the reasons why the analysis adopted by the opinion below is faulty and why the Commission's judgment was correct.

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management in the opinion urged on the Commission and the court below. If this change does not establish the necessity for accepting the Commission's construction of the "other business" clauses, it does, at the very least, emphasize the importance of permitting broad discretion to the Commission in construing the public interest standards. So, if the lower court's construction of the statute be accepted, the "may" provision of the second "other business" clause must be regarded as an indication that wide discretion is intended to be entrusted to the Commission in making exceptions from the limits of the first clause, a discretion not lightly to be disturbed by the courts on their own judgments of public interest.

In the face of the specific findings made by the Commission, the court below was not warranted in remanding the case to the Commission for further consideration. Moreover, insofar as the court seemingly rejected the considerations of public interest which the Commission had adverted to in its opinion, such a holding would have been warranted only if the evidence had been so strong that the Court itself could make the policy determination which Congress has stated the Commission "may" make. Thus, the remand to the Commission was either wholly futile and dilatory in consequence or involved a determination, which we submit was not warranted by the record, that the Commission's failure to accept Engineers' contentions was wholly arbitrary.

VI. The Commission Followed the Proper Procedure in Designating the "Single Integrated Public-Utility System" of Engineers

From the point of view of administering Section 11 the selection of the "single integrated public-utility system" is of the highest importance, because that system serves as a focal point for a determination of the additional utility systems and the "other businesses" which may be retained with it. In this case the Commission, without deciding whether or not the choice lay with Engineers as a matter of right (R. 276–278, 82n), gave it the privilege of making the initial selection and, in order to assist Engineers to exercise that privilege intelligently, made advisory findings as to the additional utility and non-utility interests which might be retained if Gulf (R. 120–149) rather than Virginia (R. 83–120) were selected as the "single" system. As we have seen, the first of the Commission orders under review was based on the Virginia electric system as the "single" system but Engineers was given fifteen days within which to petition for leave to retain Gulf's electric system instead of Virginia's (R. 154); and on a petition for rehearing and for a stay the Commission entered its second order under review, giving Engineers another fifteen-day period in which to ask for leave to substitute Gulf's electric system (R. 163–165). When these two fifteen-day periods expired without any action on the part of

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Engineers, the Commission's order based on the Virginia electric system became final.

Engineers contends that the Commission erred in failing to give it the right to select its "single" system at any time within the year permitted by Section 11 (c) for compliance with orders of the Commission under Section 11 (b). Although the opinion of the court below is not entirely clear on this point and it specifically refrained from ruling on it, there is language indicating sympathy with this contention (R. 1230–1). Moreover, although the Commission had in fact given Engineers the privilege of making the initial choice and had made advisory findings, the court stated further that "the right of selection lies with the holding company [and] that the Commission should make preliminary rulings if they are necessary to enable the holding company to make its selection" (R. 1232). The court did add at this point "that the right must be exercised without unnecessary delay; * * * that if the holding company does not make its selection in a reasonable time the Commission may designate the principal system; and that the action of the Commission in passing upon the need of preliminary findings and in fixing the time within which the selection of the principal system must be made should not be disturbed by the courts unless it appears that the holding company has been denied a reasonable opportunity

to make its choice" (R. 1232). It is these apparently conflicting statements by the court which give rise to a question as to the proper interpretation of its opinion on this point.

It should be clearly understood at the outset of the discussion of this point that Engineers does not dispute the substantive choice of the Virginia electric system as its "single" system and does not claim that the Gulf electric system should be chosen instead. Indeed, it could hardly make any such claim; for Virginia is the obvious choice by any standard. The net income of the Virginia electric system in 1940 was $4,000,000, in contrast with the net income of the Gulf electric system, which was only $2,300,000; and the Virginia electric system had a plant account of $68,000,000 as compared with $55,500,000 for the Gulf electric system (R. 83, 120). In addition—and this is perhaps most important—Engineers has represented that retention of Virginia will afford it substantial tax savings through the filing of consolidated income tax returns, whereas its interest in Gulf is not sufficient (in view of the voting rights of the Gulf preferred stock in the hands of the public) to permit the filing of consolidated income tax returns with Gulf (R. 1144–45). It seems clear, therefore, that, on the basis of the obvious standards of size and income, as well as

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tax economies, the Virginia electric system is unquestionably the primary utility system in the Engineers empire."[44]

It is clear also that Engineers' own business conduct has been governed by these same standards. In its answer to the Commission's notice instituting the proceedings under Section 11 (b) (1) it referred to the Virginia electric system as "one integrated public-utility system" and the Gulf and El Paso systems as "additional integrated public-utility systems" (R. 223); and its actions since the entry of the Commission's final order have emphasized its view of the Virginia electric system as its primary utility system. Thus, it has recently further augmented the Virginia electric system by the acquisition and merger into Virginia of Virginia Public Service Company, a non-affiliated company of substantial size operating an electric utility system in the State of Virginia."[45]

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[44] The court below stated that "the Commission recognized the difficulty of an intelligent choice until it had determined what additional systems and what additional businesses could be retained in combination with each of the two subsidiaries." (R. 1227.) Once the advisory determinations had been made and in the light of further knowledge of the facts, including Engineer's claims with respect to the tax advantages of retaining Virginia, the choice of Virginia as the point of reference for issuance of a divestment order was an obvious one.

[45] See p. 19, *supra*, for the details of this acquisition.

No action of the Commission prevented Engineers from making known its selection of either the Virginia electric system or any other utility system as its "single" system. On the contrary, it was given every opportunity to make its own choice. It could have done so by filing a voluntary plan for compliance under Section 11 (e), but did not. It failed to do so again in response to the Commission's order at an early stage of the proceedings to show cause why its maximum holdings should not be limited to either the combination of Virginia and Savannah Electric & Power Company or the combination of Gulf, El Paso and Baton Rouge Bus Company, Inc. (R. 230–37). Instead it requested the Commission to make advisory findings on the alternative assumptions that either the Gulf or the Virginia electric system would be its "single" system (R. 238–42, 246–47). After the Commission made such findings, Engineers still had two fifteen-day periods in which to petition for leave to substitute the Gulf electric system for that of Virginia. It was only after it had failed to avail itself of all of these opportunities that the Commission's order based on the selection of the Virginia electric system became final. Moreover, in the event that future conditions make it more advisable to dispose of the Virginia rather than the Gulf electric system, Engineers can still apply to the Commission to exercise its power, under the penultimate

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sentence of Section 11 (b), to "revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

In view of these opportunities, as well as the obvious correctness of the Commission's choice, we think that the court below should not have decided whether or not the choice lay with Engineers as a matter of right, since that question was not before the court, but should have held simply that the statute does not give the company the right it claims to defer its selection for an entire year. As the Circuit Court of Appeals for the Second Circuit stated in approving the similar procedure followed by the Commission in the *North American* case:

> We do not think the statute contemplates such deferment of selection. It would necessarily result in delays. The Commission's duty is to act under section 11 (b) "as soon as practicable," and due diligence in complying with the order is prescribed by section 11 (c). Nor do we see that deferment in selecting the principal system is necessary to adequate protection of a holding company against circumstances which may arise during the period allowed for compliance with the order. If changes occur in "the conditions upon which the order was predicated," the Commission is authorized by subsection (b) to revoke or

modify any order previously made thereunder."

Engineers points out that the Commission did not make advisory findings in the *North American* case as to the properties retainable with several alternative "single" utility systems, and that the making of such findings by the Commission would have delayed the issuance of an order of divestment. Here, it says, findings have already been made. The answer to this is twofold. In the first place, there is no logic in the attempted distinction depending upon whether the choice is only between two utility systems or among several. If, as Engineers contends, the statute does not authorize the Commission under any circumstances to select a holding company's "single" utility system, any holding company could, by refusing to make a selection, impose upon the Commission the impossibly extended task of making advisory findings as to properties retainable with each of ten or twelve systems. Certainly no such construction can be given a statute which requires the Commission "as soon as practicable" to order such action as "it shall find necessary" to limit the operations of each holding company system as prescribed by Section 11 (b) (1). Rather the language must be construed to give the Commis-

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[*] *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, 152 (C. C. A. 2), certiorari granted on a petition raising constitutionality only, No. 1, present Term.

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sion authority to apply the section on the basis of a "single" utility system selected by it, at least where the holding company itself has not exercised its opportunity to make the selection; and to make the Commission's choice proper and binding where it is a reasonable one on the basis of generally accepted standards, as in this case. In the second place, Engineers' contention disregards the fact that a delay consequent upon the making of advisory findings is not the only type of delay against which the Commission is required to guard. An alternative order such as Engineers requests would also be a fruitful source of delay; for a holding company might find an excuse to divert time and energy from the disposition of properties required to be divested to unnecessary contemplation and discussion concerning the selection of a "single" system. The company, like the donkey between two bales of hay, might remain immobilized, never finding a compelling reason for choosing either alternative.

The opinion of the court below, it is submitted, departs from the pronouncement of this Court that administrative agencies should be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309

U. S. 134, 143. Regardless of the privileges which the Commission found it possible to allow Engineers, there is no statutory justification for the categorical requirements imposed below (if they be deemed such) that the holding company has the right of selection in every case and that "the Commission should make preliminary rulings if they are necessary to enable the holding company to make its selection" (R. 1232). Such requirements would introduce an undesirable element of rigidity in the accomplishment of an administrative task in which a degree of flexibility is essential to determine the most expeditious method of applying Section 11 (b) (1) to the highly variegated and complex structures of the many registered holding companies; and this is particularly true in the light of the provision for modification of the order in the event subsequent developments warrant.

VII. This Court Should Affirm Those Parts of the Commission's Order Not Erroneous or Moot

A. The Commission's order is several as to each of the properties specified therein and should be affirmed as to so much of the order as is correct

The court below apparently regarded the Commission's order as unitary and felt that its finding of error as to the Virginia transportation properties required remand of the entire order. In

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fact the discussion of the selection of a principal system is based on the statement "Since the case must be remanded to the Commission for further findings in accordance with this opinion, the action which the Commission has heretofore taken in respect to the selection of the principal system becomes immaterial; but as the selection of the principal system is essential to any simplification of the corporate structure of Engineers, the legal question involved must be decided." (R. 1230.) We believe that the conception that reversal as to the "other business" clauses requires remand of the entire order is erroneous and contrary to the purpose of the statute. Unless the Commission's order was incorrect in its entirety and should have been entered in alternative form, we believe it is clear that the Commission's order is completely severable as to each property ordered to be disposed of and that the order should be affirmed as to those parts which are correct and reversed or remanded as to those parts which are incorrect. Section 24 (a) of the statute specifically provides that an order of the Commission may be modified or set aside "in whole or in part."

The statute directs the Commission to carry out its provisions "as soon as practicable." This emphasis on expedition would be defeated by a holding that every part of a Commission's order must be reversed because one part has been found

incorrect. The reversal of the Commission's order if sustained would start a new one-year period for compliance under Section 11 (c) of the Act. Such a new period would commence running as to all the properties dealt with including those as to which the Commission had properly ordered disposition as well as those such as the transportation properties with respect to which a new finding is required by the appellate court. This would result in unnecessary delay with respect to disposition of properties as to which the Commission's determination was correct and as to which the court had sustained its action. This is particularly emphasized in the present case where a program of disposition of substantial properties such as Gulf and El Paso would be held up because of an assumed error with reference to the relatively insignificant transportation properties. Moreover, reversal as in the case of the order of the court below on grounds which require reconsideration by the Commission carries with it the possibility of further petitions for review of new administrative orders pursuant to the remand, and further delay in compliance with the concededly valid portions of the original order until these new disputes may be finally determined.

If the procedure of the court below should be upheld the result might be to compel the Commission to abandon its present expeditious procedure of treating, wherever practical, all the prop-

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erties of a holding company system in one proceeding and in one order. Thus, to the end that an error with respect to a relatively minor provision might not undo the entire effect of a comprehensive order as to the system, the Commission might be compelled to adopt a procedure of commencing separate proceedings with respect to each property and entering separate orders at separate times. Such a wasteful and dilatory procedure should not be required under a statute which emphasizes expedition. Rather it should be recognized that insofar as the Commission's order is correct, it should be affirmed, and that reversal or remand should be limited to those portions of the order which are found to be incorrect.

B. THE EFFECT OF THE POSSIBLE MOOTNESS AS TO THE TRANSPORTATION PROPERTIES ON THE FORM OF THIS COURT'S ORDER

Although we have argued the question of construction of the "other business" clauses, it is our view that all questions relating to the "other business" clauses have been rendered moot by the disposition by Engineers of the Virginia and El Paso transportation properties after the opinion of the court below. If the court should so hold, and assuming, of course, that the Commission was correct in the matter of the choice of the principal system, it is submitted that the proper method of dealing

with the problem of mootness is that this Court vacate the decision of the court below insofar as it relates to the transportation properties, with instructions that Engineers' petition to review be dismissed as to this point, while affirming such remaining portions of the order of the court below as are held to be correct. In this connection it should be pointed out that the customary procedure of this Court in vacating judicial decrees in the case of mootness and ordering the entire proceeding dismissed (cf. *Securities and Exchange Commission* v. *Long Island Lighting Co.*, No. 1059, last Term, decided *per curiam* April 30, 1945) does not call for any modification of the Commission's order itself. For in cases of review of administrative proceedings the petition to review is the first judicial phase of the case and is comparable to the complaint in the ordinary judicial proceeding. Mootness prevents or eliminates a justiciable controversy with respect to the administrative order. Thus, the proper procedure is not to deal with the part of the Commission's order which has been complied with and is moot but merely to order the petition for review in the court below dismissed insofar as its presents a moot question. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *Sprunt & Son, Inc.*, v. *United States*, 281 U. S. 249; *United States* v. *Anchor Coal Co.*, 279 U. S. 812.

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CONCLUSION

The decision of the court below should be reversed insofar as it set aside the two orders of the Commission, and these orders should be affirmed in all respects, except insofar as the petition to review brought in the court below is moot and in those respects the petition to review should be ordered dismissed.

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APPENDIX A

The Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C., sec. 79 *et seq.*, provides in pertinent part as follows:

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commis-

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sion made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of

arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which

directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by

order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in

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respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

* * * * *

POWER TO MAKE PARTICULAR EXEMPTIONS REGARDING HOLDING COMPANIES, SUBSIDIARY COMPANIES, AND AFFILIATES

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption

detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and

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derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. When-

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ever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

(d) The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that such specified class or classes of persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

TRANSACTIONS BY UNREGISTERED HOLDING COMPANIES

SEC. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.

(b) Every holding company which has outstanding any security any of which, by use of the mails or any means or instrumentality of interstate commerce, has been distributed or made the subject of a public

offering subsequent to January 1, 1925, and any of which security is owned or held on October 1, 1935 (or, if such company is not a holding company on that date, on the date such company becomes a holding company) by persons not resident in the State in which such holding company is organized, shall register under section 5 on or before December 1, 1935, or the thirtieth day after such company becomes a holding company, whichever date is later.

* * * * *

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof, and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a

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single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commision shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

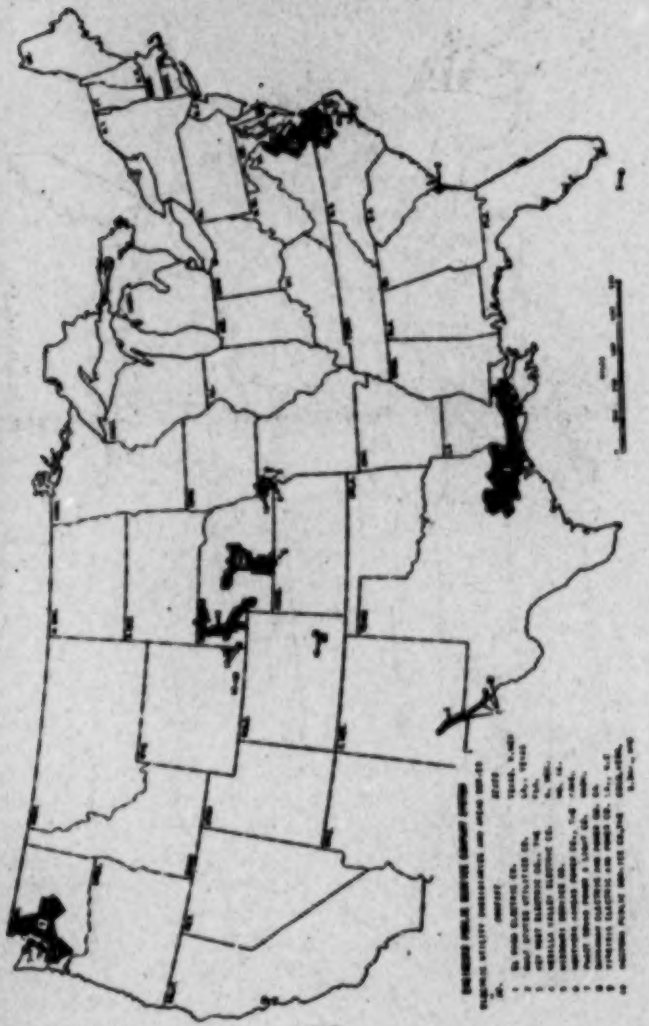
(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each sub-

sidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

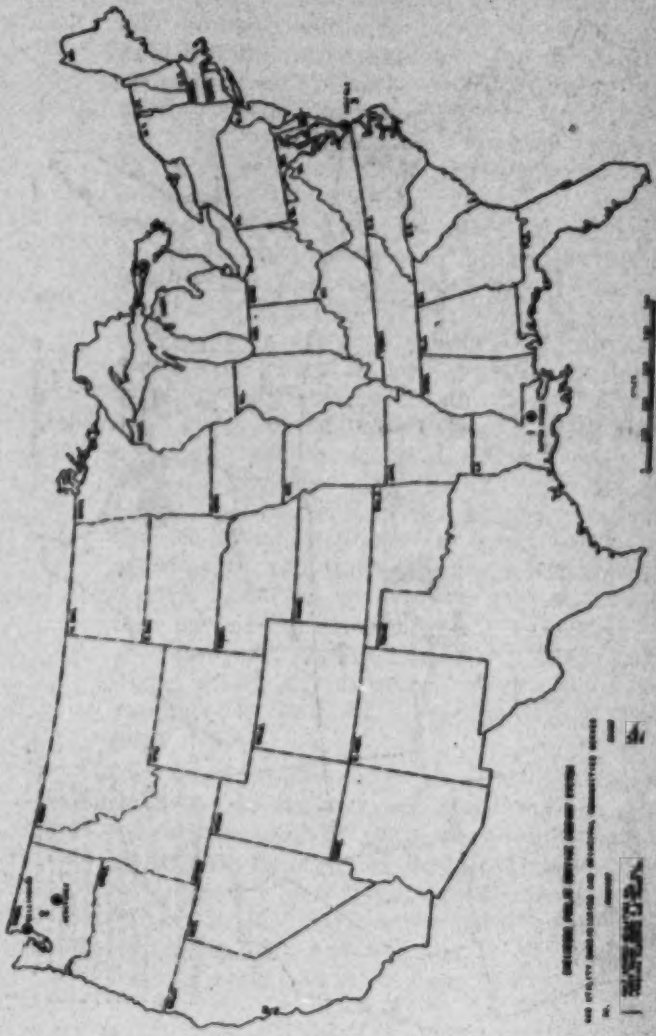
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APPENDIX B



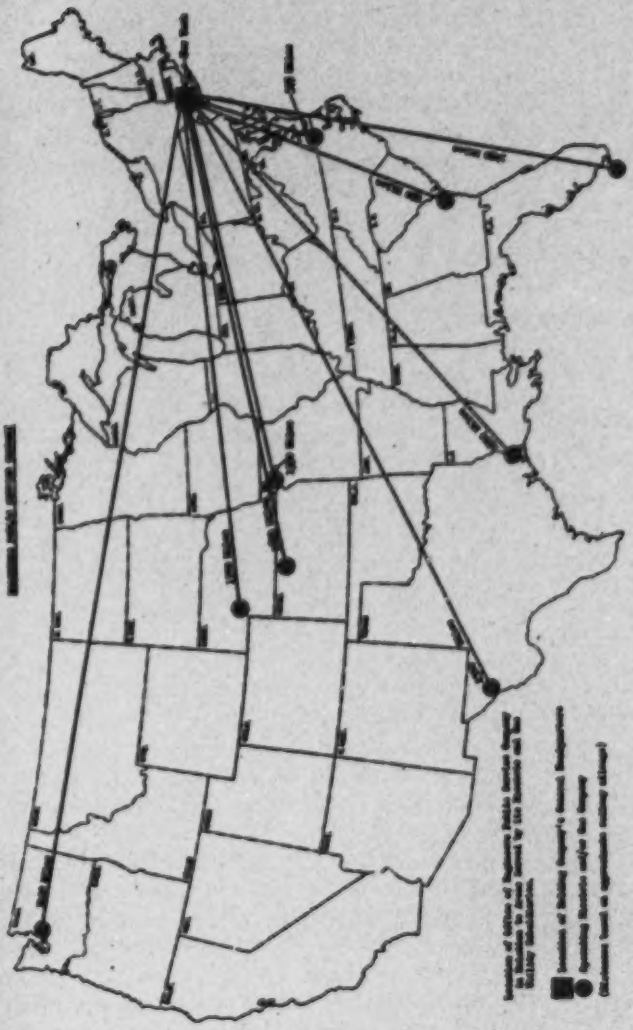
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APPENDIX - O



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APPENDIX D



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